

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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STUDENTS FOR FAIR ADMISSIONS, INC.,

Plaintiff,

Civil Action  
No. 14-14176-ADB

v.

November 2, 2018

PRESIDENT AND FELLOWS OF HARVARD  
COLLEGE, et al.,

Pages 1 to 155

Defendants.

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TRANSCRIPT OF BENCH TRIAL - DAY 15  
CLOSING ARGUMENTS  
BEFORE THE HONORABLE ALLISON D. BURROUGHS  
UNITED STATES DISTRICT COURT  
JOHN J. MOAKLEY U.S. COURTHOUSE  
ONE COURTHOUSE WAY  
BOSTON, MA 02210

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on November 2, 2018.)

THE COURT: Good morning, everyone. Can I see the parties at sidebar for one second.

[Sidebar sealed and redacted.]

THE COURT: All right. So for the audience, we were just discussing scheduling up at sidebar. Mr. Hughes is going to close first. He's going to reserve some time, so we will take a break after his opening closing, and then we will hear from Harvard. That should take us right to the lunch break. We'll break for lunch, and then we'll come back for SFFA's rebuttal and the two Amici closings.

Mr. Hughes, I know we discussed this yesterday, but try and keep your voice up because you have a cast of thousands wanting to hear what you say this morning.

MR. HUGHES: I'll try to be very loud, Your Honor.

THE COURT: Excellent.

MR. HUGHES: Thank you, Your Honor.

**PLAINTIFF CLOSING ARGUMENT**

MR. HUGHES: John Hughes for SFFA.

1           Your Honor, all of the claims here in this case are  
2 important, but we're going to spend most, if not all, of our  
3 time today in closing on Claim 1, the question of intentional  
4 discrimination against Asian-Americans, and we'll give more  
5 fulsome treatment to the other claims in our post-trial  
6 briefing.

7           I want to start with what everyone knew going into  
8 this case. Asian-Americans continue to face racial bias and  
9 are often falsely stereotyped as shy and reserved, book smart  
10 and one-dimensional, perpetual foreigners or model  
11 minorities. How did that play out here at Harvard?

12           Harvard has a personal rating that is important to  
13 admissions that is designed to measure how outgoing or  
14 personable its applicants are, measuring subjective character  
15 traits such as likability or effervescence. And what the  
16 undisputed evidence shows is that Harvard's system for the  
17 years at issue in this case, the Harvard classes of 2014 to  
18 2019, the Harvard admissions office awarded Asian-American  
19 applicants statistically significantly lower personal scores  
20 than it did for white applicants.

21           Harvard does not and cannot dispute this. Lower  
22 personal scores, statistically significant, critical to  
23 admissions.

24           There are two possible explanations here. There's  
25 SFFA's explanation, that bias and stereotyping explain the

1 disparity, not a racist conspiracy, but bias and stereotypes  
2 that even well-meaning people are susceptible to deploying.  
3 And the law is clear, in a subjective process with proof of  
4 statistical discrimination, evidence of bias and stereotyping  
5 can suffice to show intentional discrimination.

6 This is particularly true in a system like  
7 Harvard's that is not race-neutral. And here, even though  
8 Harvard has a race-conscious admission system where it claims  
9 to consider the race of every applicant who provides it, it  
10 did not provide bias training. It did nothing to address or  
11 debunk commonly held stereotypical beliefs about  
12 Asian-Americans or other racial or ethnic groups.

13 And this remained true even after Harvard received  
14 repeated warnings from the Harvard Office of Institutional  
15 Research that its admissions system might be imposing an  
16 Asian penalty.

17 And even if we give Harvard the benefit of the  
18 doubt on the Office of Institutional Research, maybe this was  
19 just a preliminary warning, its response is not what you  
20 would expect from an institution committed to preventing  
21 discrimination against Asian applicants.

22 Dean Fitzsimmons, despite receiving repeated  
23 analysis from OIR showing an Asian penalty, told no one else  
24 in the admissions, not Director McGrath, no one. Didn't tell  
25 his boss. Didn't tell anybody. Didn't follow up. Just



1 plowed on ahead. SFFA's explanation that intentional  
2 discrimination is the reason for the undisputed disparity in  
3 the personal score is the likely one.

4 Then we have Harvard's explanation. Harvard's  
5 explanation buys into these stereotypes that the Asian  
6 penalty is the result of Asian-American applicants not being  
7 sufficiently multidimensional: the words of Dr. Card,  
8 Harvard's expert. Harvard suggests that Asian-American  
9 applicants are a group of one-dimensional academic  
10 superstars, many of whom Harvard has decided don't have the  
11 right personal qualities for Harvard. Book smart, not  
12 personable. That's Harvard's explanation based on the  
13 ratings that Harvard's admissions officers determine.

14 Two possible explanations but only one persuasively  
15 lines up with the evidence. And what hopefully we all know  
16 in our hearts, Asian-Americans do not have worse personal  
17 qualities than any other group. Harvard's explanations must  
18 and should be rejected.

19 Now I want to turn to the evidence. And it brings  
20 us to the most important issue in the case in terms of both  
21 the modeling and the statistical fight and the evidence  
22 beyond that of intentional discrimination, and that is the  
23 personal score.

24 It is important for two independent reasons, and I  
25 want to make sure this is crystal clear. First, if race

1 influenced the personal score in any meaningful way, even if  
2 only as an avenue for Harvard to award preferences to  
3 African-American and Hispanic applicants, it must come out of  
4 Dr. Card's model. Because at that point it is not  
5 distinguishable from the overall rating. I'll say more about  
6 that in a minute.

7 And the reason why this is so important to the case  
8 is that Dr. Card admits that if you take the personal rating  
9 out of either the model that he reported in his original  
10 report or the model that he or reported in his rebuttal  
11 report, there is a statistically significant Asian-American  
12 penalty. So if you resolve that factual question in our  
13 favor, it ends the statistical case.

14 And now I want to talk about how we need to compare  
15 the treatment of the overall score, how Dr. Card and  
16 Dr. Arcidiacono treated that, and then line that up with the  
17 evidence about the personal score. And what I'm hoping to do  
18 is to connect the dots and show you that the way race is used  
19 in the overall score, a score that's supposed to consider all  
20 the information in the application and race is only a small  
21 part of that; and even so, both experts agree it has to come  
22 out.

23 The evidence is just as strong that race plays at  
24 least a similarly powerful role in awarding the personal  
25 score. And once we connect those dots and win that factual

1 dispute, the statistical case is over.

2 So let's look in particular, before we get to the  
3 evidence of the personal score, about what Dr. Card admitted  
4 yesterday to Mr. Mortara about the overall score.

5 First of all, we just had some basic questions  
6 about the overall score that Dr. Card admitted. The overall  
7 rating may be influenced by race; he agreed. Can be affected  
8 by race; he agreed. Contain some potential race-based tips;  
9 he agreed.

10 Then we followed up. We asked him, "Since your  
11 analysis seeks to isolate the incremental effect of race on  
12 admissions decisions, it is inappropriate to include any  
13 variable that themselves can be affected by race, correct?"  
14 And he agreed, and that any variable admission applies  
15 equally to the overall score as it does to the personal score  
16 if we demonstrate that race is influencing the personal  
17 score.

18 And the last piece I want to make sure that we  
19 focus on is that Dr. Card agrees that if race is influencing  
20 a score only where Harvard is administering its preferences  
21 for African-American and Hispanic candidates, if it's doing  
22 that, it has to come out, and Harvard is going to have no  
23 answer that that is happening in both the overall and  
24 personal scores and that is the testimony that I've got on  
25 the screen that's at slide 4 in your binder where Dr. Card

1 agrees that if race is being used to administer preferences  
2 in a particular rating, it's got to come out of the model.  
3 That's what he agreed in his sworn testimony.

4 So now I want to focus on the evidence about  
5 whether or not race is influencing the personal score, the  
6 dispute relevant to the big modeling choice in this case. I  
7 want to start with Plaintiff's Trial Exhibit 631, which is  
8 slide 5 in your binder, Your Honor. This is a slide that  
9 shows comparably qualified academic candidates to Harvard  
10 stratified by academic decile. We've talked about that a  
11 number of times during the trial. At the top of my chart are  
12 the most competitive candidates by GPA and SAT score, and it  
13 goes down from there.

14 And the first thing I want to draw Your Honor's  
15 attention to is the total column over here on the right-hand  
16 side, and we see that it is reasonable to look at the award  
17 of high personal scores stratified by academic qualification  
18 because there's a correlation between getting a high personal  
19 score and academic qualification. You can see it starts at  
20 26. 2 percent for the top academically qualified candidates  
21 and then marches down from there. So that's the reason this  
22 is a good way to look at evidence about the personal score.

23 And then we turn to the racial distribution of the  
24 personal score and we see something very interesting. We see  
25 that for comparably qualified academic candidates to Harvard

1 at every single decile all along the way African-Americans  
2 get the most personal scores of 2 or higher by a significant  
3 percentage. First place, every time.

4 Then if we look at the column for Hispanic  
5 applicants to Harvard, they get on average -- they're in  
6 second place in terms of getting a personal score of 2 or  
7 higher every single time. Then we turn to the white  
8 applicants, third place every time. And the Asian-American  
9 applicants, dead last every single time. We think this is  
10 strong evidence that race is being used in the personal score  
11 for all of these different ethnicities, and it's evidence of  
12 an Asian penalty. But I want to draw your attention to the  
13 point that I've already made; that this is clearly a place  
14 where Harvard is administering its racial preferences, the  
15 tips that it gives to African-Americans and Hispanic. And  
16 remember, Harvard has admitted -- they agree in this case --  
17 that African-American applicants to Harvard get more of a tip  
18 than Hispanic applicants, and we can see that relationship  
19 right here in the personal score data.

20 So now I want to turn to the comparison between the  
21 overall rating and the personal score in terms of this  
22 descriptive data that comes right of out of Harvard's open  
23 database. This is Plaintiff's Exhibit 38. It's page 19 of  
24 your deck, Your Honor. What I've got at the top, I've  
25 limited this to the top four academic deciles, the top 40

1 percent of the academically competitive candidates to  
2 Harvard. And I'm comparing the overall rating distribution  
3 by race of a personal score of 2 or higher to the same thing  
4 with the personal score. And what we see is that there's a  
5 very important lining-up of the distribution of these  
6 personal scores.

7           So in the overall rating, where Harvard admits that  
8 it uses race to give tips and preferences to African-American  
9 and Hispanic candidates, we see that just like on the last  
10 slide that we looked at in the overall rating,  
11 African-Americans are leading the way. They're getting the  
12 highest overall ratings compared to similarly academically  
13 qualified candidates. Hispanics in second place. Whites in  
14 third. Asians last every single time. And we see that that  
15 lines up with the personal rating in terms of the pattern of  
16 that distribution, which is strong evidence that just like  
17 race is used in the overall score to award preferences, it's  
18 also used in the personal rating, and just like in the  
19 overall score, Asian-American applicants are getting awarded  
20 lower scores than similarly academically qualified applicants  
21 from other groups, the same thing is turning up in the  
22 personal score.

23           And the last thing I'll say on this slide is that  
24 when Your Honor asked Professor Arcidiacono whether these  
25 differences were statistically significant he explained that

1 they were, which is yet further evidence that we've got race  
2 both in the overall score where they admit that it's used and  
3 in the personal rating.

4           So now I want to turn to the last piece of data or  
5 statistical evidence that supports our view that race is  
6 influencing the personal score. That is the model that Dr.  
7 Arcidiacono ran to analyze this very issue. And I want to  
8 make sure Your Honor is clear. Now I'm on slide 31, Your  
9 Honor, Plaintiff's Demonstrative 38. I want to be clear.  
10 Dr. Arcidiacono ran a number of different models. The one we  
11 talked the most about was his preferred model, sometimes  
12 referred to model 5, which looked at the ultimate admissions  
13 outcome penalty on Asian-Americans. What I'm talking about  
14 here is a different model where he tried to determine whether  
15 or not race was the thing that was driving the differences  
16 that we just saw in the last two slides in the personal score  
17 among the four different groups that the experts analyzed in  
18 this case.

19           And so what Dr. Arcidiacono did is he ran a  
20 logistic regression model that controlled for everything that  
21 Harvard says explains the difference between Asian-Americans  
22 and white applicants: school rating support, teacher rating,  
23 interview ratings and so forth, controlled for all of that  
24 and yet found a statistically significant difference in the  
25 awarding of personal scores based on race.

1           And he had a discussion about the explanatory  
2 power. That was the whole pseudo R-squared discussion that I  
3 think Mr. Mortara resolved in his cross-examination. His  
4 model at a minimum has strong explanatory power for the  
5 difference in the distribution of personal scores based on  
6 race.

7           And what he found was that Asian-Americans in the  
8 personal score have a penalty based on race based on his  
9 model, and that just like Harvard admits that there are  
10 preferences, there's a boost for African-American applicants  
11 and there's a boost for Hispanic applicants, and that  
12 relative boost, African-Americans doing better than  
13 Hispanics, which Harvard admits, we see right here in the  
14 evidence.

15           And Dr. Card, other lobbying criticisms about pseudo  
16 R-squared, he doesn't have a model on the other side of this.  
17 He didn't try to model and isolate whether or not race was  
18 influencing the personal score. Only SFFA's expert did that.  
19 They basically got nothing on the other side.

20           Now I want to turn to the evidence from the  
21 admissions office about whether or not race was influencing  
22 the personal score. But before I do that, I want to make two  
23 last points. Neither Dr. Card nor any Harvard witness gave  
24 any testimony explaining, disproving or even attempting to  
25 explain the differences that we see in terms of the racial



1 distribution of the overall score and the personal score in  
2 terms of Hispanic and African-Americans doing significantly  
3 better than the white applicants and Asian applicants, which  
4 is alone sufficient to prove that race is infecting the  
5 personal score.

6 Dr. Card has zero opinions on that. No testimony  
7 on that. And no Harvard witness came in to explain that.  
8 All the evidence has gone to trying to explain the difference  
9 between Asian applicants and white applicants. And we'll  
10 have more on that later. But the fact dispute of whether  
11 race influences the personal score, they've got nothing on  
12 that point.

13 So now let's turn to the Harvard witness testimony  
14 about whether or not race is influencing the personal score  
15 and has to come out of Dr. Card's model. Mr. Lee said in  
16 opening that nothing has changed, nothing meaningful has  
17 changed about Harvard's admissions process since the Supreme  
18 Court blessed it in the Bakke decision back in the '70s and  
19 certainly nothing changed since OCR did a two-year  
20 investigation of Harvard's admissions office looking at the  
21 issue of Asian-American discrimination in 1990 and issued a  
22 50-some-odd- page report.

23 And then we had carefully studied OCR's finding and  
24 wanted to make sure we understood Harvard's position on that.  
25 So when Dean Fitzsimmons came to testify, I asked him, "Do

1 you think the description of how Harvard uses race in the  
2 1990 OCR report is still accurate?" And he said, "Certainly  
3 the general description in the outlining, yes." And then we  
4 went one step further. And I asked an improper question  
5 about whether they'd ever stopped. Then I rephrased and I  
6 asked him, I said, "Since you've been dean, have Harvard  
7 admissions officers ever used race in awarding personal  
8 scores?" And he answered, "Not to my knowledge." We're  
9 looking now, Your Honor, at the testimony on slide 9.

10 And the reason that was important, Dean Fitzsimmons  
11 was dean way before the OCR investigation, and he's saying  
12 not to my knowledge, no one's ever used race in awarding a  
13 personal score, and his testimony is unequivocal. But it  
14 turns out that that's not what his own admissions officers  
15 told the OCR investigators in the late 1980s and in 1990.  
16 And we've looked at this portion of Plaintiff's Exhibit P555  
17 many times. What it says is that some readers would award --  
18 consider race in the overall score in the committee process  
19 while other readers indicated that ethnicity was a factor  
20 considered throughout the entire admissions process. They  
21 stated that it could be reflected in the four reiterating  
22 areas, which Your Honor knows includes the personal score.  
23 And then the other set of folks that talked to OCR said they  
24 would only ever consider race or ethnicity if the candidate  
25 indicated it was important somehow in their application. So

1 people doing it different ways, but certainly people  
2 admitting that they were using it in the personal score.

3 And Harvard's reaction to this is important. They  
4 didn't institute any new guidelines after this or make any  
5 changes after this. What they did is actually, years later,  
6 doubled down on it in 2012 when the Harvard Office of General  
7 Counsel went back to OCR in 2012 responding to a claim of  
8 Asian-American discrimination and told OCR that the  
9 description OCR had put in that statement of findings that we  
10 looked at about how race is used in the Harvard admissions  
11 process was still accurate as of 2012.

12 And I want to try to pause and see if we can make a  
13 little sense of this incongruity about what Harvard says  
14 today and about what Harvard told OCR in the past. Harvard  
15 wants to suggest today that it's had an iron-clad prohibition  
16 on the consideration of race in the personal score from time  
17 in memorial. The OCR evidence just fundamentally disproves  
18 that, as does Harvard's reaction to the OCR evidence.

19 And the reason this can make sense is that it would  
20 not be, Your Honor, automatically unlawful for Harvard to use  
21 race in the personal score if they did it in a defined and  
22 narrowly tailored way. If that's how they decided they  
23 wanted to award their preferences for the candidates that  
24 they have determined need tips, if they did it within the  
25 confines of the law, they could do it that way. And it turns

1 out the evidence shows that's what they've been doing. We  
2 see the substantial preferences for African-Americans and  
3 Hispanic applicants in the personal score.

4 The reason that this has turned into such a big  
5 deal in this case is because once the experts were hired and  
6 everybody starting to crunch the numbers, people realized  
7 that if Harvard admitted that it was using race both in the  
8 overall score where it has admitted that it has done so  
9 forever, and in the personal score, then they had a real  
10 problem with the statistical analysis in this case. So now  
11 Harvard is trying to build this defense that race isn't used  
12 in the personal score, but it's not consistent with the  
13 things that it said in the past. And I think that gives a  
14 little explanatory power to what we've seen in term of the  
15 evidence of OCR.

16 Now I want to turn to the evidence about what  
17 Harvard's admissions officers said about the use of race in  
18 the personal score. And now I'm on slide 12, Your Honor.  
19 And I've got some clips of testimony from some of the  
20 witnesses that came to testify here at trial on this issue.  
21 And I think we all remember Mr. Mortara's cross-examination  
22 of Mr. Looby, who came in here and changed his testimony on  
23 things from his deposition many times. And I want to get  
24 into the specifics of what he said on the personal score in a  
25 minute, but I want to frame the credibility of what happened

1 with Mr. Looby, who went to a deposition, and all he had to  
2 do was tell the truth about how he does his job, the thing he  
3 does every day. Not that hard to do.

4 And he was asked questions about how he considered  
5 race, which is what this case is about, and other things  
6 about how he did his job. And he gave honest answers because  
7 it's not hard to give honest answers about how you do your  
8 job. But some of the things he said were a real problem for  
9 Harvard, like what we've got on the screen right here, where  
10 we're impeaching him with his deposition at trial, and his  
11 deposition testimony was, "You were asked whether you would  
12 take a student's race into account when assessing his or her  
13 personal qualities," and his answer was, "Just like with the  
14 academic rating, it's one factor of many I consider." And he  
15 said it in other places, too, and Mr. Mortara had to impeach  
16 him over and over again.

17 And what we learned is that even though he had an  
18 errata and a chance to correct that testimony, that never  
19 happened. Instead he spent ten days with Wilmer lawyers for  
20 three plus hours a day to come in and give the testimony that  
21 he gave, and you can judge the credibility of what happened  
22 there.

23 But then we get to the next witness, which is  
24 Charlene Kim, and I thought she gave some pretty important  
25 and interesting testimony on this issue which illustrates how

1 race is used in the personal score. Mr. Strawbridge asked  
2 her, "When considering the personal score, you also think  
3 about how the applicant will add to the community, correct?"  
4 She says, "Yes," and gave an explanation. The very next  
5 question we asked her, "You would agree, right, that a  
6 student's race or ethnicity is part of how they can help add  
7 to the community?" And she says, "Yes." So she's connecting  
8 those dots between the things that she's considering in terms  
9 of personal score, how will they add to the community, which  
10 is consonant with all the subjective characterizations that  
11 we've heard of what the personal score is trying to measure.

12 And one of those things that admissions officers at  
13 Harvard have in mind is that the reason they use race in the  
14 admission system is to add to their community in terms of  
15 making a diverse campus. And so it's hard, I think, to  
16 disentangle the consideration of race and the considerations  
17 that go into awarding the personal score. And that's exactly  
18 what we see from Charlene Kim's testimony.

19 And the last example that I've got here on the  
20 slide is the testimony of Erica Bever. And we asked her,  
21 Mr. McBride asked her, "Does race ever factor into an  
22 applicant's personal rating?" And the answer we got was one  
23 that you heard over and over again. We, in our war room,  
24 called it Harvard's slogan, was "No, not per se." We heard  
25 that from Dean Fitzsimmons, and even Dr. Card picked up on

1 it. But what she explained was, she said, "I may not -- the  
2 fact that they're a particular race but certainly students  
3 might write about their background and things like that that  
4 would inform my personal rating and what I give in the  
5 personal rating."

6 And the reason this is important is remember back  
7 to Dr. Card's admissions on the overall score, what we need  
8 to demonstrate is that there's an influence of race on the  
9 personal score one of the many things people are considering  
10 in awarding that score, just like in the overall score. And  
11 if we connect those dots, it should come out of the model  
12 because Dr. Card agrees any variable that's influenced has to  
13 come out.

14 And the reason Ms. Bever's testimony is important  
15 and other witnesses that gave testimony like it, is that we  
16 know that many applicants to Harvard are writing about their  
17 experiences facing discrimination, their identity in terms of  
18 ethnicity or race, and we heard a lot of that testimony on  
19 the day that we had the students testify, which is evidence  
20 that that is in front of these admissions officers in many  
21 instances and is necessarily, based on the kind of testimony  
22 that we saw from witnesses like Ms. Bever, going to lead to  
23 the consideration of race in the personal score.

24 And any doubt about all of this is resolved I think  
25 by the testimony that Dean Fitzsimmons gave on both these

1 issues, on the overall score on the one hand and the personal  
2 rating on the other hand. And I've got that testimony on the  
3 screen, and it's slide 13. And he was asked about the  
4 overall rating. "How can race be considered in the  
5 preliminary overall rating?" And he answered, "If as the --  
6 you're doing your preliminary overall rating, if you think  
7 that this might be an additional little element that might be  
8 helpful in terms of making a case that this person, as I say,  
9 might be an unusual educator of others, the person might  
10 decide to factor that into the preliminary overall rating."  
11 So a very hedged view of how race might affect the  
12 preliminary overall rating. But that kind of relationship  
13 between race and the preliminary overall rating was  
14 sufficient for both experts to determine that variable was  
15 influenced by race and it had to come out.

16 And we see the same kind of thing when he's asked  
17 on the personal rating, "Can circumstances related to  
18 someone's race or ethnicity result in facts, circumstances or  
19 events that are useful in assigning the personal rating," he  
20 answered, "Sure," and then goes on to give an answer similar  
21 to Ms. Bever about people writing about overcoming  
22 discrimination and other life experiences.

23 So there's really no way to differentiate the role  
24 that race is playing in these two scores, which is why the  
25 personal rating has to come out of Dr. Card's model, and the



1 statistical case is over once you resolve that factual  
2 dispute in our favor.

3 And the last point that I'll make here is that  
4 Harvard's new reading procedures that we talked about with  
5 Director McGrath yesterday, we view, are remedial measures  
6 prohibiting the use of race in the personal score, and that  
7 evidence is probative of Harvard's use of race in the  
8 personal score in the past. I'll have more to say on the new  
9 reading procedures in a bit.

10 So that brings us to Dr. Arcidiacono's model. And  
11 I've got the results of his admissions outcome model on the  
12 screen. And this is the model that he ran. It was called  
13 his preferred model, sometimes referred to as model 5, with  
14 all of his variables to determine whether Asian-American  
15 students were facing an admissions penalty, outcome penalty,  
16 in applying to Harvard. And he ran it on both the baseline  
17 dataset which excluded the athletes, the legacies, the  
18 children of faculty and staff and dean's list, ALDCs, and he  
19 ran it on the expanded dataset which included everybody but  
20 the 1300 athletes that were included in the dataset. And in  
21 both of those analyses he showed a statistically significant  
22 outcome penalty on Asian-American students for admission to  
23 Harvard. And as Your Honor knows, this model leaves in the  
24 preferences for African-American and Hispanics. It's just  
25 measuring the Asian penalty.

1           So then we get to Dr. Card's criticisms of this  
2     model. And I'm going to talk about how Dr. Arcidiacono  
3     addressed those criticisms. Dr. Card criticized Dr.  
4     Arcidiacono for removing the personal rating for failure to  
5     include parental occupation and intended career variables.  
6     And, Your Honor, I'm on slide 15 right now, looking at  
7     Plaintiff's Demonstrative 38. And he had some other  
8     criticisms. And what Dr. Arcidiacono did is he did a  
9     robustness check on his model and addressed most of the  
10    criticisms that Dr. Card made, and he still found the  
11    statistically significant Asian penalty.

12           And this now brings us to the issue of the ALDCs,  
13    because this robustness check, the evidence that you have in  
14    front of you, was only run on the baseline set. It's where  
15    the ALDCs were removed. And so in terms of the statistical  
16    case and the modeling choices, Your Honor, the ALDC issue is  
17    really only relevant at this point, from our perspective, to  
18    two things. One is the reliability of the robustness check  
19    because it's run without those in the group; and two, if you  
20    decide that it's appropriate or at least a reasonable choice  
21    to exclude the ALDCs from the pool, it increases the size of  
22    the Asian penalty, but it's not required to get us there  
23    under Dr. Card's model or under Dr. Arcidiacono's model  
24    either.

25           So let me say, let me now try to address the ALDC

1 issue, which has been the subject of testimony and questions  
2 from the court on a number of different instances. And first  
3 I've just got Plaintiff's Exhibit 634 up on the screen, which  
4 just kind of sets the stage with some basic data about this  
5 group, which is that, on average, the admission rates you can  
6 see across the bottom, whites are admitted 43 percent of the  
7 time, Asians 44, African-Americans 46 and so forth, the admit  
8 rate amongst the groups is very similar, and the group is  
9 overwhelmingly white. 5,000 white applicants. Only 840  
10 Asian applicants in the group. So that's what we're seeing  
11 in the group.

12 But there's been maybe some confusion or at least  
13 some confusion on my part as I listened to the evidence on  
14 this issue and how it relates to the issues in the case that  
15 Your Honor needs to decide. So let me see if I can clear up  
16 what the experts had to say here. First, the experts agreed  
17 that the evidence in the case shows that Asian ALDCs are  
18 awarded lower personal scores than white ALDCs; the bias and  
19 stereotyping runs pool-wide. Second, the experts agree,  
20 including Dr. Arcidiacono, that there is not a statistically  
21 significant admissions outcome difference for Asian ALDCs.  
22 In other words, even though there's a penalty on the personal  
23 score for Asians in this group, the models don't show that  
24 the applicants from this group are facing a statistically  
25 significant outcome penalty. In other words, they're getting

1 admitted to Harvard. And the way discrimination works in  
2 this case is if you're not admitted to Harvard on the basis  
3 of your race, which is why we're not claiming that there's  
4 discrimination in that pool for this very small amount of  
5 Asian-American applicants because we can't see a  
6 statistically significant outcome penalty notwithstanding the  
7 difference that we see in the personal score.

8 And let me try to put a little meat on the bone for  
9 why that might be true. We'll return to Dr. Card's "on the  
10 bubble" demonstrative that's on slide 17 in your binder. And  
11 what he explained is that when you're up on the right-hand  
12 side, up on the top of the bubble, that's when you've got a  
13 really good chance of getting in, and that's when some of  
14 these preferences can really help you.

15 And we've heard evidence about how very qualified a  
16 lot of these ALDC applicants are, they're very strong. And  
17 what we see is they're going to be at the high end of that  
18 bubble, many of them. And we see on Dr. Card's next slide,  
19 which is on page 18 of your binder, there's a very  
20 significant bump-up for lineage for ALDCs, particularly at  
21 the top of the bubble. That's what we're seeing in the  
22 eight, nine and ten columns in his bar graph. And I think it  
23 turns out that the boost of all the applicants in the ALDC  
24 group, including the Asian-Americans, is overwhelming of  
25 relatively smaller personal score penalty that we're seeing

1 for Asian-Americans in that group. And there may be other  
2 things going on as well. As you can see from the  
3 demographics slide, there's not that many Asian-Americans in  
4 the ALDC group. There may be other things about them. But  
5 for whatever reason, we're not seeing a statistically  
6 significant outcome penalty in terms of admissions to  
7 Harvard, which is why we're not claiming a discrimination for  
8 that part of the applicant pool.

9 Now, turning to the modeling question, which is a  
10 different question, whether it's appropriate to remove ALDCs  
11 from the group and analyze the rest of the pool. And the  
12 reason we say that it is is that these applicants are  
13 categorically different than the rest of the applicants to  
14 Harvard. They get in at about, on average, 45 percent admit  
15 rate versus about a four and a half to five percent admit  
16 rate to the rest of the pool. Many of them have ties to the  
17 college. Many of them get a staff interview. They're just  
18 engaged. They're a different group than everyone else. And  
19 what that means is by including them in the group in terms of  
20 the modeling effect, Dr. Arcidiacono explained this, it  
21 dilutes the power of Harvard's ratings because Harvard's  
22 ratings turn out not to matter as much for this group that's  
23 getting in at a wildly higher rate than the rest of the pool,  
24 and removing them helps us to give an apples-to-apples  
25 comparison for the vast majority of Asian applicants are not

1 in that part of the pool, and we want to compare them to  
2 similarly situated applicants, not to the ALDCs, which are  
3 kind of categorically different.

4 And the last thing I'll have to say on the modeling  
5 choice is that Harvard's suggestion that this is somehow a  
6 methodologically flawed approach is a bit in tension with how  
7 it's treated the OCR report from 1990. It's held that up as  
8 exonerating them and is good evidence for them. And what  
9 happened there is that Harvard told OCR to look at and  
10 analyze the question of Asian-American discrimination by  
11 removing ALDCs from the group. And this happened a long time  
12 ago in the trial, but I want to remind Your Honor, looking at  
13 slide 19, that what OCR did with its logistic regression  
14 model is it ran one on the whole group and then another one  
15 by removing ALDCs from the pool that it ran its logistic  
16 regression model and conclusions from that, and Harvard has  
17 touted those conclusions and even basically encouraged OCR to  
18 take this approach, so the suggestion that there's some fatal  
19 methodological flaw for doing that doesn't really hold up.  
20 And as I've explained, at the end of the day, it turns out to  
21 be not all that important for the modeling in this case.

22 So now I want to turn to our additional evidence of  
23 intentional discrimination beyond the statistical evidence.  
24 And here I want to start with the evidence from the Office of  
25 Institutional Research. I want to begin by putting that

1 evidence in context. The evidence is important for two  
2 reasons, Your Honor. First and foremost, Harvard's lack of  
3 response to evidence of potential discrimination against  
4 Asian-American applicants is evidence of intentional  
5 discrimination.

6 And we're not going to focus on the law much, at  
7 least I'm not today, but I've got a case up on the screen,  
8 Columbus Board of Education, that gets at that basic point.  
9 "Actions having foreseeable and anticipated disparate impact  
10 are relevant evidence to prove the ultimate fact, forbidden  
11 purpose." And the point is here that the OIR evidence is  
12 evidence of intent, even if you concluded that it does not  
13 definitively establish an Asian penalty in fact, even if it  
14 doesn't ultimately answer the statistical evidence, because  
15 it's evidence of a potential problem that Harvard knew about  
16 in its admission systems. And as we'll walk through in a  
17 minute, the response of Dean Fitzsimmons and Harvard to that,  
18 forging ahead, is evidence of intentional discrimination.

19 And the second reason it's relevant, we do think it  
20 puts a thumb on the scale for the ultimate fact question on  
21 whether there is an Asian penalty because they found one, as  
22 we'll talk about in a moment, and that was done before any  
23 lawsuits were filed or anybody with a point of view hired an  
24 expert. So it's something that was done before litigation  
25 that happens to line up on our side with Dr. Arcidiacono,

1 done by a group that everybody, including President Faust,  
2 admitted yesterday did solid, reliable work that's relied on  
3 all the time by people at Harvard.

4 So now let's turn to the evidence about OIR. We've  
5 fought long and hard to get P9 into evidence, Your Honor.  
6 Harvard says Dean Fitzsimmons didn't see it and that it was  
7 an early draft. We don't think that's particularly credible.  
8 We think he did see it and that it does show an Asian  
9 penalty, including in the personal score. But we don't need  
10 P9 to prove our case, so I'm not going to focus on it today.

11 I'm going to start with P12 in terms of what we're  
12 going to focus on, and there's no dispute -- and now I'm on  
13 slide 22, Your Honor -- that Dean Fitzsimmons saw this at the  
14 February 25, 2013 meeting with the people from OIR, Erin  
15 Driver-Linn, Erica Bever and Mark Hansen. And I want to put  
16 the timing of this meeting in context because, as Your Honor  
17 knows, in late 2012 there was the Unz article and the David  
18 Brooks article on Christmas Eve in the New York Times raising  
19 the issue of whether or not Harvard is discriminating against  
20 Asian-American applicants. And that set off a firestorm  
21 within Harvard, emails going to the provost, to the  
22 president, to all the top deans, to Dean Fitzsimmons, to  
23 people within OIR, emails flying back and forth all over the  
24 holiday break and into the new year.

25 And we saw additional evidence that alumni and



1 donors were getting in touch with Dean Fitzsimmons, looking  
2 for a response, asking what they were doing. So the context  
3 of the February 25 meeting has to be viewed in light of the  
4 fact that there was significant focus amongst not only people  
5 within Harvard administration but also from the alumni and  
6 donor network focused on precisely this issue of whether or  
7 not Harvard was discriminating against Asian-American  
8 applicants to Harvard.

9 So I want to walk through P12. But before we get  
10 into what it says and go through it one last time together, I  
11 want to show Your Honor how Harvard described this document  
12 in its summary judgment papers and then what Dean Fitzsimmons  
13 had to say about it when he came to testify here under oath  
14 at trial.

15 In the summary judgment papers, Harvard said the  
16 documents originated within OIR were not in response to a  
17 request from the admissions office; that the analysis in  
18 question was not directed to whether there is bias against  
19 Asians in college admissions at Harvard; no person outside of  
20 OIR asked OIR to conduct the analysis; the work done by OIR  
21 employees was not intended to address whether Asian-American  
22 applicants were experiencing discrimination, and did not  
23 answer the question.

24 Then when I asked Dean Fitzsimmons about this  
25 evidence at trial, he agreed that it was part of the work

1 that his office, the admissions office, was coordinating on  
2 with Harvard's Office of Institutional Research at least in  
3 part related to the concerns about, that came around the Unz  
4 article and discrimination against Asian-Americans. He said  
5 that would certainly be part of it, and that OIR ran logistic  
6 regressions model for the admissions office. I'll leave you  
7 to judge the credibility of the incongruity of these two  
8 descriptions. But we think it goes to the spin that Harvard  
9 is trying to put on the OIR story, both back at the summary  
10 judgment stage and here at trial.

11 So the question of whether or not this was a study  
12 into whether Asians were being disadvantaged in Harvard's  
13 admissions process is actually answered on the third page of  
14 Plaintiff's Exhibit 12, which is slide 24 in your binder.  
15 And one of the things that it analyzed in this document is  
16 does the admissions process disadvantage Asians. And the  
17 interesting thing about this language is it was put into this  
18 PowerPoint presentation by Mark Hansen, who came here to  
19 testify. And when I asked him questions on the stand here  
20 about whether he was doing analysis about whether the process  
21 disadvantaged Asians, he wouldn't give me answers that were  
22 straight with his testimony. I had to impeach him two times  
23 with his deposition on language that came right out of the  
24 document that he edited, which is just more evidence about  
25 Harvard's credibility or lack thereof on this issue.

1           So what did P12 actually show? Well, turn to page  
2   34 of P12, and we've looked at this a lot. And what it shows  
3   is that Asians are disadvantaged by the personal score and  
4   demographics. That's because if you look at model 3, when  
5   extracurricular and personal score are put into the model,  
6   the Asian percentage of the class goes substantially down.  
7   And when this evidence was provided to Dean Fitzsimmons, he  
8   admitted on the stand that he knew that as a group  
9   Asian-American applicants were doing better on the  
10   extracurricular scores, so what was doing the work here was  
11   the personal score operating as an Asian penalty. And we see  
12   that the Asian percent of the class goes down once ethnicity  
13   and race is included in model 4.

14           So Dean Fitzsimmons understood what was happening  
15   here. He understood that OIR did serious reliable work. And  
16   if there were any doubt about what the results of this study  
17   raised in terms of the possibility of whether Harvard's  
18   process was biased against Asian-Americans, that doubt is  
19   entirely put to rest by page 38 of P12, which questions  
20   raised about admissions, is there bias against Asian in  
21   college admissions. That's the question that OIR is raising  
22   here.

23           And Harvard's response to this document is not in  
24   my mind credible. First Harvard says the study was  
25   preliminary. It does say that with bold and underlined on a

1 page that we've seen many times. And evidently, to Harvard,  
2 that's a word that captures all sorts of unstated criticisms  
3 to the model, even though no one wrote any of those  
4 criticisms down at the time or can even remember anyone  
5 verbalizing them today. And of course we saw yesterday that  
6 the word "preliminary" appears on lots of OIR work, including  
7 work that potentially went to the board.

8 And Dean Fitzsimmons' response was not one you  
9 would expect of an institution concerned with whether there  
10 was an Asian penalty, especially in light of all the  
11 attention this issue was getting -- this issue was getting at  
12 Harvard at the time. The response to a preliminary warning  
13 would be at least to tell Director McGrath who he'd worked  
14 with 30 years to try to see if there was a problem, but he  
15 didn't do that or tell anyone else. The only response is the  
16 study merely confirmed what he already knew, but that's not  
17 much of an answer at all because the study showed  
18 Asian-Americans were being penalized in the admissions  
19 process and raised the possibility of bias right here on the  
20 screen.

21 So the suggestion that this lined up with  
22 expectations is at best evidence of willful blindness to a  
23 serious discrimination problem or worst evidence that Harvard  
24 knew about the problem all along. But even if you give Dean  
25 Fitzsimmons and Harvard full credit, 100 percent credit for

1 their explanation to P12 and what was going on February 25  
2 when this was delivered to Dean Fitzsimmons, and even if you  
3 forgive the description of this document at summary judgment,  
4 there is no way Harvard can get past the rest of the OIR  
5 evidence that shows an Asian penalty.

6 And I want to go to a timeline here that I've made  
7 starting on page 28. And what we've got here is that on  
8 April 15 -- April 15, 2013, Dean Fitzsimmons is asking OIR to  
9 analyze whether low-income applicants to Harvard are getting  
10 a tip or a boost in admissions to Harvard, and that was kind  
11 of similar to the Asian-American discrimination issue. At  
12 the same time there were articles in the press criticizing  
13 elite institutions like Harvard for failing to do enough to  
14 get low-income students admitted to their campuses. So Dean  
15 Fitzsimmons asked the same researchers at OIR that prepared  
16 P12 to take a look and see whether low-income students were  
17 getting a tip to Harvard.

18 And he got his answer on Plaintiff's Exhibit 21 on  
19 April 22. And he was supplied some slides, three slides in  
20 that exhibit, Your Honor, including one that showed the  
21 output of the logistic regression model. And when I asked  
22 him what this showed, and the testimony is here on the  
23 screen, is that what these slides showed to him from the  
24 logistic regression model, it's very similar to the model  
25 that was in P12, is that it was in fact empirical proof of a

1 tip for low-income applicants. No qualifications, no  
2 hedging, empirical proof that there's a tip, which is just  
3 the opposite of a penalty, and we'll get into that in a  
4 minute.

5 And he was gratified. He was happy to receive  
6 these results because Harvard laudably does want to give a  
7 tip to low-income students, and he wanted to share that  
8 information more broadly, a fact that he shared with Erin  
9 Driver-Linn. But Dr. Driver-Linn, the director of OIR, had  
10 some concerns about sharing that information more broadly, so  
11 she got in touch with the top PR person, Christine Heenan, at  
12 Harvard, one of the top PR people, on April 28. And she said  
13 that Dean Fitzsimmons is excited to share this information,  
14 but there may be some concerns. And she explains to  
15 Christine Heenan that Fitz asked us to do some analysis of  
16 thumb on the scale for low income. It could be a positive  
17 message but has implications for need-blind policy as well as  
18 opening the door for Unz-like requests for information about  
19 other thumbs on the scale.

20 So why was Ms. Driver-Linn concerned that the  
21 information that Dean Fitzsimmons was providing on April  
22 26 -- April 22, why was she concerned that would open up the  
23 door to the Unz-like Asian-American discrimination requests?  
24 We see that in the draft of the memo that was ultimately  
25 provided to Harvard on May 1. And I've got it here on the

1 screen, Your Honor, it's on slide 31 in your deck,  
2 Plaintiff's Demonstrative 41. And this is the draft that OIR  
3 is writing. And they say "On the flip side, we see a  
4 negative effect for Asian applicants." This is in the same  
5 study about low income. "These realities have also received  
6 intense scrutiny from critics like Bowen or more recently Unz  
7 as we have discussed at length. To draw attention to the  
8 positive benefit that low-income students receive may also  
9 draw attention to the more controversial findings around  
10 Asians or the expected results around legacies and athletes."  
11 This is the draft memo by OIR addressed to Dean Fitzsimmons.

12 And when Dr. Driver-Linn came here to testify at  
13 trial, she admitted the realities that were discussed at  
14 length concerning the negative effect on Asian-American  
15 applicants. That discussion occurred at the February 25,  
16 2013 meeting. That's her testimony, and this is her  
17 contemporaneous memorialization of what happened at the time,  
18 which is considerably more credible than the explanations  
19 we're getting now, is that no one saw the Asian penalty in  
20 these documents.

21 Which brings us to the final memo that was  
22 delivered to Dean Fitzsimmons on May 1, which is Plaintiff's  
23 Exhibit 26. And again it has -- this is the edits to that  
24 narrative that we just looked at, but it still makes clear  
25 that there are demographic groups that have negative effects,

1 and the only demographic group in P26, as we'll see in a  
2 minute, that has a negative effect are Asian-Americans.

3 So what happened when we discussed this evidence at  
4 trial? I reminded Dean Fitzsimmons that he had agreed that  
5 the logistic regression model here provided empirical  
6 evidence of a low-income tip, and in asking him about Exhibit  
7 26, I said, "It provides more empirical evidence about how  
8 the Harvard admissions process works," and then he agreed  
9 with that. And then we went to look at that additional  
10 empirical evidence, and this is the table in P26 that appears  
11 just above the narrative about negative effects on certain  
12 demographic groups, and Dean Fitzsimmons was ready to admit  
13 he understood that the estimate coefficient that we have here  
14 for the low income of .98 was positive associated with  
15 admission to Harvard, unqualified yes testimony.

16 And then when I asked him whether the coefficient  
17 for Asian, which has a negative sign in front of it, was a  
18 sign that there was a negative relationship between being  
19 Asian and admission to Harvard, he suggested that he couldn't  
20 interpret that because he wasn't an expert in statistics. I  
21 don't think it requires that much expertise to interpret  
22 that. But we learned the next day after I went back and  
23 reviewed his deposition is that he was reasonably  
24 well-informed with modern statistical techniques. He had  
25 previously taught a course in statistics, admittedly a long



1 time ago, and that he had been part of studies at Harvard  
2 using logistic regression in the past. He was very familiar  
3 with the term "logistic regression." And we read some  
4 testimony in from Dr. Driver-Linn's deposition that's part of  
5 the record in this case, and she volunteered in her  
6 deposition that they felt comfortable showing preliminary  
7 work to Dean Fitzsimmons because he loved to talk about  
8 statistics and he presumably still does.

9 So the idea that that Asian penalty that's reported  
10 right there in P26 wasn't understood by Dean Fitzsimmons is  
11 not credible. It's from the same regression model that they  
12 admit provides evidence of a tip for low income. The same  
13 regression model shows a penalty, a negative association with  
14 being Asian to admission to Harvard. And if there is any  
15 debate about what that negative coefficient means, it's fully  
16 resolved in the two paragraphs below the table which say it  
17 shows a negative effect on certain demographic groups. The  
18 only demographic group that is there are Asians that are  
19 treated negatively.

20 And what Harvard says about this document is, well,  
21 it wasn't meant to study whether there was a negative effect  
22 of being Asian in the Harvard admissions process. The  
23 assignment was to go out and study whether or not there was a  
24 tip for low income. So we can I guess then just ignore the  
25 evidence about an Asian-American penalty. But that excuse

1 doesn't add up.

2 If you tell OIR to do an assignment, and it finds  
3 like what you like on the one hand with a tip for low income  
4 and what you don't want to focus on that you don't like on  
5 the other hand, you don't just get to ignore racial  
6 discrimination because the original assignment had to do with  
7 something else.

8 So here we have OIR communicating about the Asian  
9 penalty. And what happened next? What happens next is that  
10 Dean Fitzsimmons asked for a follow-up to see whether or not  
11 there was a tip for low-income Asian-American applicants.  
12 And that gets into P28. And I think, Your Honor, something  
13 in my mind pretty incredible that happened here at trial is  
14 that Mr. Lee, in opening and then again when he was examining  
15 Dean Fitzsimmons, they both represented to this court that  
16 P28 shows a boost, a benefit, a tip for low-income Asian  
17 applicants to Harvard. And there are some ways to read that  
18 document which suggests that that could be true.

19 But what the document also definitively  
20 unquestionably shows from the same regression analysis  
21 performed by OIR is that for 82 percent of the Asian  
22 applicants to Harvard who are not low income -- and I've got  
23 the demographic data right from that exhibit -- for those 82  
24 percent in the same document where they say low-income Asian  
25 applicants get a tip, it shows that the 82 percent that apply

1 get hammered with a penalty.

2 And there's no way they can have it both ways. So  
3 they knew there was a penalty. They did nothing about it,  
4 and that is alone sufficient for us to carry our burden and  
5 have proof of intentional discrimination, especially in the  
6 face of the reaction where no one in the admissions office  
7 was told, not Director McGrath, not anybody, no further steps  
8 were taken to look into this and dig into it deeper. After  
9 this, it was just business as usual.

10 So the OIR evidence shows there's a real  
11 possibility of bias in the system, a statistically  
12 significant penalty for Asian-Americans. Harvard ignores it.

13 Now I'd like to review the evidence of bias in  
14 Harvard's admissions process. And I want to start with just  
15 a brief touch-and-go on the law. Now I'm on slide 32, the  
16 Thomas Weisman Kodak case, which is that we don't have to  
17 prove racist cabal. I don't think the evidence would support  
18 that. What we have here is the ultimate question of whether  
19 the employee has been treated disparately because of race.

20 This is regardless of whether the employer  
21 consciously intended to base the evaluations on race or  
22 simply did so because of unthinking stereotypes or bias. And  
23 that's what we think the evidence lines up with in this case.  
24 So what I want to focus on now is the evidence of bias, both  
25 implicit evidence of bias and explicit evidence of bias. And

1 I want to start with explicit evidence of intentional  
2 discrimination against Asian-American applicants that happens  
3 in the recruiting process at the very front end. And this  
4 brings us back to where we started the trial: to sparse  
5 country. And what happens here is that Harvard spends out  
6 invitations to people to apply to Harvard as part of its  
7 important recruitment techniques. And Harvard admits that  
8 these recruiting efforts are part of how Harvard consciously  
9 shapes its class.

10 And here what Harvard does is that it invites white  
11 applicants to apply to Harvard in sparse country with scores  
12 as low as 1310, but Asian men and Asian women from those same  
13 states, from those same schools, have to have a 1370 if  
14 you're a man, 1350 if you're a woman to get applied. And  
15 there is no reason to do this, other than race. It's the  
16 only difference, and that is intentional race discrimination  
17 plain and simple. No other explanation.

18 And the interesting thing, when I confronted Dean  
19 Fitzsimmons with this testimony, I actually thought he might  
20 say, Gee, I didn't know about this. We should take a look at  
21 it. There's not that many people in sparse country, although  
22 there are significant Asian communities in Phoenix and Las  
23 Vegas and New Orleans and other places, but instead he gave  
24 an innocence answer that I thought was very interesting. He  
25 explained, when I confronted him with this evidence, that

1 there were some people in sparse country who have only lived  
2 in a sparse country state for a year or two. Let's say that  
3 can happen. Then on the other hand there are people who have  
4 lived there for their entire lives. And this is precisely  
5 the kind of stereotyping and bias this case is about.

6 Because the new arrivals in this answer are the Asian  
7 students, stereotyped as perpetually foreign, while the folks  
8 who have lived in sparse country forever are the white kids  
9 that Harvard is expressly preferring in this situation.

10 Now that brings us to the part of the process that  
11 starts once applications are being reviewed. Where do we see  
12 the evidence of bias or stereotyping? We come back to the  
13 personal score. We've talked about how it's important to the  
14 statistical analysis, but it's also independently important  
15 of evidence of discrimination within Harvard's admissions  
16 process because it's at least in part based on subjective  
17 determinations by the admissions office about personality.

18 And Mr. Mortara made a couple of demonstratives  
19 with the witnesses on this subject during the testimony.

20 I've got the one that he made with Mr. Looby on the screen,  
21 which I believe is slide 45 in your notebook, Your Honor.

22 And they went through that the personal rating gets at who  
23 the person is, what the person brings to the community, which  
24 I'll remind you connects right back to why Harvard uses race  
25 in its admissions process, whether they work well with

1 others, meaningful relationships, likability, positive  
2 personality, all subjective characteristics. And then he  
3 made a similar demonstrative with Director McGrath, same  
4 kinds of things, likability, good person, integrity,  
5 helpfulness, courage, kindness.

6 We've seen all of this, very subjective  
7 determinations, that Your Honor knows by and large the  
8 admissions officers in the Harvard admissions office are  
9 awarding this personal score on a cold record, on paper,  
10 without having met anybody. And that's precisely where bias  
11 can creep into a system where race is considered for every  
12 applicant who provides it and throughout the process. And we  
13 actually heard testimony about this bias issue from several  
14 of Harvard's witnesses. We heard about it yesterday from  
15 President Faust, and she agreed that research on implicit  
16 bias shows that everybody has some implicit bias. And she  
17 even agreed that Harvard has a responsibility to ensure that  
18 bias is not leaking into its admissions decisionmaking  
19 process in any form. She said Harvard should do its utmost  
20 to address questions of bias.

21 And we also heard from Dr. Simmons, when she was  
22 asked about some research that she and others had done on how  
23 women were treated in higher education. And we confronted  
24 her with decades of cognitive psychology research reveals  
25 that most of us carry prejudice of which we are unaware and

1 nonetheless plays a large role in our evaluation of people,  
2 and that in every study that's been examined there's a  
3 significant effect of bias based on the gender or race of the  
4 person being evaluated.

5 So this is all true in our world. And we know that  
6 there are the stereotypes that we talked about at the  
7 beginning. And when you have a subjective process and we  
8 know that bias is possible, bias around race, bias around  
9 gender, the fact that Asian-American applicants face a  
10 statistically significant penalty on the subjective personal  
11 rating year after year is pretty strong evidence that bias  
12 has crept into, leaked into the system. And it's particular  
13 true when you analyze that in the context of some of the  
14 admissions officers that we asked about this issue.

15 We actually asked, Mr. Strawbridge asked Charlene  
16 Kim when she came to testify. She's been there eight or nine  
17 years. And he asked her, "You would have no explanation if  
18 Asian-Americans were to receive year after year lower  
19 personal scores than white applicants, for example, correct?"

20 "That's not what I see as a member of the  
21 committee."

22 "That's not been your experience during your nine  
23 years on the admissions committee, has it?"

24 "It has not."

25 And the reason that's important is we know there's

1 a statistically significant difference in that score. Her  
2 expectation is that she wouldn't see that. She's not  
3 pointing to personal scores or teacher supports or some kind  
4 of difference that she observes kind of categorically about a  
5 group by the data. She says we wouldn't expect to see that.  
6 And that's evidence that bias has crept into the system, even  
7 if it's implicit or unconscious bias. That's what we see  
8 here. And we've got similar testimony from Director McGrath  
9 along the same lines that it wouldn't be her experience,  
10 again, evidence of bias. So when the empirical disparity is  
11 incongruous with the expectations of long-time admissions  
12 officers, that's when you know you might have a problem.

13 So what is the bias that is creeping into the  
14 process? We actually heard some interesting testimony on  
15 this from Dr. Chin, who is an Asian-American studies  
16 professor who is an alumni interviewer who came here to  
17 testify on Monday. And she actually wrote an article that  
18 you may remember in 1983 looking at this issue of how bias  
19 could affect personal ratings in admissions to Harvard.

20 And, she in that article, and we talked about it  
21 with her on the stand, helpfully categorized some of those  
22 stereotypes or biases that have been deployed over the years  
23 against Asian-Americans. And one of them was this concept of  
24 over-representation, the idea that Asian-Americans are only 5  
25 or 6 percent of the population as a whole but have a



1 significantly greater percentage of the admitted class at  
2 elite institutions like Harvard. That's one of the things  
3 that she identified as a stereotype.

4 And it was interesting to us that Dr. Arcidiacono  
5 was questioned on this very issue for reasons that were  
6 unclear to us. But again, this is the kind of thing that Dr.  
7 Chin identified. And then the other types of bias that we've  
8 seen in this case, one is the idea that there is a  
9 career-focus bias. And we've seen that in this idea that  
10 Asian-Americans are stereotyped as being overly interested in  
11 math or science or doctors. That's a bias that can creep  
12 into the system and one that's potentially crept into Dr.  
13 Card's analysis in his intended-career variable where he says  
14 that explains the discrimination against Asian-Americans, and  
15 yet we see that variable shows that a lot of Asian-American  
16 applicants to Harvard do want to be scientists or doctors.

17 And then we've got the next stereotype that's been  
18 identified both by Dr. Chin in her article and in the OCR,  
19 this idea of passive personalities, shy and so forth, yet  
20 another stereotype that's been identified. And finally we've  
21 got this idea of the model minority, which again was  
22 identified both by Dr. Chin and in the OCR report. And to  
23 round it out, we connected the dots with Dr. Chin and we  
24 asked her, you know, "Vestiges of this history remain. Today  
25 Asian-Americans continue to face racial bias and are often

1 falsely stereotyped as timid, exotic perpetual foreigners or  
2 model minorities." And we asked her what this means is that  
3 Asian-American still face some of the same kinds of  
4 stereotyping that you wrote about in your 1993 article, and  
5 she said, "Some of them, yes."

6 So that's the kind of bias that can leak into the  
7 system here. And that brings us back to the new reading  
8 procedures, which is an important piece of the evidence for  
9 Your Honor to consider. Of course we know now, Your Honor,  
10 that there were some problems with the testimony of Dean  
11 Fitzsimmons and Director McGrath on the existence of written  
12 guidance around the use of race in the admissions office when  
13 they came to testify the first time.

14 Your Honor is familiar with that testimony. And  
15 whether you ascribe a sinister motive or not to what happened  
16 here, the fact of the matter is that the new guidance is  
17 powerful evidence for our case for a couple of reasons.

18 I'll talk about why. As we discussed, Charlene  
19 Kim, Director McGrath, we just looked at the testimony, they  
20 did not expect to see a personal score disparity, but it's in  
21 the data nonetheless. It's statistically significant. So  
22 what we had happen here is Harvard took corrective action.  
23 It changed its reading procedures to ban the consideration of  
24 race in the personal score and more importantly to the  
25 stereotyping issue that we've been talking about, exhorting

1 readers not to overvalue extraversion.

2 And I've got here now on slide 57 at your deck,  
3 reading procedures for the class of 2023 that Mr. Mortara and  
4 Director McGrath talked about yesterday. And again, it says,  
5 "It is important to keep in mind that characteristics not  
6 always synonymous with extraversion are similarly valued.  
7 Applicants who seem to be particularly reflective, insightful  
8 and/or dedicated should receive higher personal ratings as  
9 well." A corrective step to combat some of the bias and  
10 stereotypes that leaked into the Harvard admissions office.  
11 We know they leaked in because of the statistically  
12 significant disparity in the personal score.

13 And Director McGrath, to her credit, admitted that  
14 this instruction is designed to make sure that your  
15 admissions officers do not fall prey to implicit bias or  
16 racial stereotyping about Asians in part. She said it would  
17 have that effect and then went on to say that it's not a new  
18 idea, it's been memorialized in the past.

19 But what I think we can see from a fair reading of  
20 the evidence is that this bias did creep in. We have the  
21 statistically significant disparity. There's no other good  
22 explanation other than stereotyping and bias. And to  
23 Harvard's credit, they actually finally did something about  
24 it in 2023. It's a step in the right direction, and this I  
25 think is an admission as much. And this was a necessary step

1 because we did see some concrete instances of Harvard  
2 admissions officers deploying the kind of stereotyping that  
3 we talked about.

4 And I won't belabor the anecdotal evidence because  
5 we don't think it's particularly important in a statistical  
6 case with a bunch of data. But we've got P116 on the screen.  
7 I think you'll remember a discussion of this from Dr.  
8 Arcidiacono's testimony that the person got a personal score  
9 of 3, notwithstanding being a professional figure skater,  
10 amazing life story, a lot of hardship, overwhelming teacher  
11 support and alumni interviewer report, Asian applicant to  
12 Harvard, given a personal score of 3, labeled a standard  
13 strong, no evidence that the application was ever considered  
14 again.

15 And then again we saw some evidence in the record  
16 that Asian-American applicants to Harvard were labeled as  
17 quiet or shy. It's not that there's something inherently  
18 wrong about labeling somebody as quiet or shy, but that's a  
19 stereotype that's deployed against Asian-Americans that  
20 doesn't really apply to other groups. That's why it's a  
21 stereotype. And it's evidence that bias has leaked into the  
22 system.

23 So Harvard took a small step in the right direction  
24 with the new reading procedures to address this, but it  
25 didn't even go as far as some of its supporters have

1 suggested in this case. And we're back to the testimony of  
2 Dr. Chin, the professor of Asian-American studies. And she  
3 says she exhorted Harvard to increase training on cultural  
4 bias and to be educated on the stereotypes that work against  
5 Asian-American applicants. And the evidence that Harvard did  
6 that in this case is minimal, no more, evidently, than  
7 sending around an article on implicit bias years ago.

8 And the final piece of the puzzle in the new  
9 reading procedures is something that came up many times  
10 during the trial. Before the new reading procedures, Harvard  
11 had no written instructions on how or where to use race. And  
12 we go back here to a document that we visited many times.  
13 I'm on slide 62 now. This is Plaintiff's Exhibit 555, the  
14 OCR report. And we've got this sentence. "There are no  
15 formulas or specific criteria for measuring or assessing  
16 ethnicity." That's fine. Next half of the sentence is  
17 important. "Nor are there instructions for determining how  
18 much weight is given to ethnicity or where the weight is to  
19 be applied in the admissions process." This goes all the way  
20 back to 1990. And we saw in the same document admissions  
21 officers were using race in different parts of the process,  
22 assigning it different relative importance. We saw that all  
23 the way back in 1990, and that persisted all the way to  
24 today.

25 And to the extent that Harvard -- well, didn't have

1 written instructions before September. To the extent they  
2 had oral instructions, the evidence in this case is that they  
3 weren't that memorable, at least for the people who testified  
4 at their deposition when they were testifying honestly about  
5 how they do their job. And we've got the admission here on  
6 the screen from Chris Looby that he didn't recall anyone ever  
7 teaching him how to use race. We've got the testimony from  
8 Lucerita Ortiz where she doesn't recall the specific  
9 substance of any training. And you can see the other  
10 admissions that we've got here on the slide.

11 So to the extent that Harvard had oral training, it  
12 wasn't memorable, and it certainly didn't provide the kind of  
13 guidance that the new reading procedures had. So Harvard had  
14 a problem, and they tried to fix it with the new reading  
15 procedures, which again, we think is evidence of a  
16 recognition that there was bias and stereotypes and a problem  
17 with the way Harvard used race in its admissions process.

18 Now, the last thing I want to do is address  
19 Harvard's explanation for the new reading procedures, because  
20 I think it just confirms our point.

21 What Harvard says happened here with the new  
22 reading procedures is that a group of admissions officers got  
23 together over this past summer in 2018 and made changes,  
24 including to the directions of the personal score. And the  
25 people who did this work were led by Christine Mascolo, who

1 is the associate director of the admissions office, who has  
2 been there for 17 years. And she worked with others who have  
3 been there for a while as well.

4 And they assembled reading procedures, and they  
5 sent them out to everybody in the admissions office on  
6 September 19, 2018, and they said, "Attached please find the  
7 updated reading instructions for the year." And they told  
8 everybody to read the document thoroughly, and they thanked  
9 everybody who had helped in the editing process, and they  
10 didn't suggest there was any problem with the document they  
11 circulated or that it was in any way incomplete. And what  
12 Harvard wants us to believe is that these experienced people  
13 who had been there in some instances as long as 17 years,  
14 they just went out to memorialize what everybody knew all  
15 along about how Harvard used race in its admissions process  
16 and in the personal score.

17 And what Harvard wrote, what these people wrote in  
18 this draft was that in the directions on considering race in  
19 the overall to score was to only consider it if an applicant  
20 writes about it, makes an issue of it in its application,  
21 just like they consider religion. That's what the people who  
22 were seeking to memorialize how to use race said in this  
23 document.

24 Of course Harvard can't admit that that's true for  
25 a number of reasons, and issued an updated guidance on

1 October 5 striking that language. And Director McGrath  
2 testified yesterday that the language that was included in  
3 P720 and its attachment was dead-bang wrong. But the reason  
4 that's important for our case is because it shows that even  
5 experienced people in the Harvard admissions office have no  
6 idea how race had been used, how it's supposed to be used,  
7 and when you have lack of controls in a system that's using  
8 race, considering it with every applicant, and you have  
9 evidence of statistical disparity for Asian-Americans in the  
10 subjective personal score, those lack of controls are  
11 evidence of yet further bias.

12 I'm going to wrap up now, Your Honor, and save some  
13 time for Mr. Mortara to come back later. Before I do, I'd  
14 just like to thank you for all the effort and attention that  
15 you've put into this case and everybody else here. Thank you  
16 very much.

17 THE COURT: All right. Finished right on time,  
18 Mr. Hughes. Why don't we take a 15-minute break and we'll  
19 come back at 11:00.

20 (Recess taken, 10:45 a.m.)

21 MR. LEE: Thank you, Your Honor. May I proceed,  
22 Your Honor?

23 THE COURT: You may.

24 **DEFENDANT CLOSING ARGUMENT**

25 MR. LEE: On behalf of the faculty, students,



1 administration and staff and the many members of the Harvard  
2 community, I begin by thanking the Court and all of the court  
3 staff for the opportunity to address the very serious  
4 accusations by SFFA. We thank you for your close attention  
5 to what has been at times very detailed evidence, and we  
6 thank you for your patience.

7 SFFA began its opening statement by contending  
8 that, and I'm quoting, the wolf of racial bias is at  
9 Harvard's door.

10 On this, we agree. The wolf of racial bias is at  
11 Harvard's door and at the door of this courthouse. That wolf  
12 is not intentional discrimination by anybody in the Harvard  
13 admissions office. That wolf comes in the form of SFFA and  
14 its experts. It is those who would turn back the clock. It  
15 is those who would eviscerate the progress we have made by  
16 pursuing not just sanctioned but lauded, race-conscious  
17 admissions policies. It is those who would reduce  
18 dramatically the number of African-American students and  
19 Hispanic students on our college and university campuses  
20 today.

21 Now, to be sure, Your Honor, the vehicle SFFA has  
22 manufactured to pursue its goal is a claim that Harvard  
23 intentionally discriminates against Asian-American  
24 applicants. As we said at the outset of our opening, Harvard  
25 does not discriminate against Asian-American applicants.

1 Harvard has not discriminated against Asian-American  
2 applicants.

3 What the evidence has demonstrated is that Harvard  
4 has worked over the years tirelessly to create a vibrant  
5 educational environment that includes students from all walks  
6 of life. We do not admit simply GPAs and board scores.

7 We admit people. We admit people from a variety of  
8 backgrounds who bring to the campus a range of experiences,  
9 talents, and perspectives. This effort to create a community  
10 that is diverse, including, to be sure, racially diverse, is  
11 very much deliberate. It is very much intentional and, as  
12 Your Honor has heard, it is critical to Harvard's mission of  
13 preparing students to contribute to our increasingly diverse  
14 society.

15 Now, Your Honor has heard directly from the people  
16 that SFFA has accused of discrimination. And as I'll come to  
17 later, the precise claim of discrimination has been a moving  
18 target over a long period of time.

19 But you heard from President Faust, Dean  
20 Fitzsimmons, Dean Khurana, Dean Smith, Director McGrath, and  
21 current and former admissions officers Roger Banks, Erica  
22 Bever, Chris Looby, Charlene Kim, Tia Ray, and Elizabeth  
23 Yong.

24 These folks came to court. They sat in that  
25 witness chair. They subjected themselves to the crucible of

1 cross-examination and explained just why SFFA's accusations  
2 are not only wrong but unfounded and very unfair.

3           You heard those admissions officers explain how  
4 they carefully and thoroughly evaluate each and every  
5 applicant and how they take into account a multitude of  
6 factors when making admissions decisions. You heard that  
7 race can make a highly competitive applicant's application  
8 even more compelling, continuing that applicant into the  
9 admitted pool, just as being from Sparse Country or being an  
10 extraordinary musician or being an extraordinary intellect  
11 could tip you into the applicant pool.

12           And, Your Honor, you heard from some of the  
13 remarkable students and alumni who were admitted as a result  
14 of this holistic and comprehensive process. You heard how  
15 diversity inside and outside the classroom at Harvard has had  
16 a profound impact on their educational experience.

17           In contrast to all of this, what did you hear from  
18 SFFA? The next slide are the fact witnesses representing the  
19 plaintiff. It's blank. Not a single member of SFFA took the  
20 stand.

21           In fact, Your Honor, no one who testified, no one  
22 who took the oath had ever met with or spoken with any one of  
23 the SFFA members who claim to have been denied admission at  
24 Harvard. Not one of their application files was introduced  
25 into evidence. Dr. Arcidiacono had them all, and not a

1 single file was introduced into evidence for any of their  
2 standing members.

3 If there was an application file after all of this  
4 that showed discrimination, wouldn't we have seen it? The  
5 fact that none was introduced actually leads to the contrary  
6 conclusion there is none.

7 So where does that leave SFFA? It leaves it, Your  
8 Honor, candidly, with an illogical, contradictory, meritless  
9 discrimination claim.

10 The evidence has made clear just what you would  
11 have to believe from SFFA to credit their claim of  
12 discrimination. You would have to conclude that Harvard  
13 actively recruits Asian-American students only to  
14 discriminate against them once they apply. You would have to  
15 conclude that the process that involves multiple readers of  
16 applications, multiple subcommittee reviews, multiple full  
17 committee reviews, and decisions made openly by a group of 40  
18 people is somehow being manipulated to discriminate against  
19 Asian-Americans.

20 You would have to conclude that Harvard's  
21 admissions office is favoring Asian-Americans who happen to  
22 be athletes, legacies, faculty children, staff children, on  
23 the dean's list or the director's list. But then for some  
24 inexplicable reason, the same admissions officers are  
25 discriminating against Asian-American applicants who are not

1 in these categories.

2 You would have to conclude that Harvard is not  
3 discriminating against Asian-American women or  
4 Asian-Americans in California but are discriminating against  
5 other Asian-Americans.

6 And you would have to conclude that to carry out  
7 this bizarre scheme of discriminating against some but not  
8 all Asian-Americans, the admissions officers assigning the  
9 academic and extracurricular ratings which are on the screen  
10 now, ratings, Your Honor, that everyone agrees reflect  
11 subjective judgment, are giving Asian-American applicants  
12 better scores on those ratings than the objective or the mere  
13 quantifiable data would justify.

14 To be clear, it is not that Asian-Americans are  
15 being scored higher on these ratings just because they have  
16 better board scores or better GPAs or because they have more  
17 extracurricular activities. The admissions officers who are  
18 reading these files are scoring Asian-Americans higher in  
19 these categories on the nonobservable, nonquantifiable  
20 factors.

21 But to believe SFFA, that same admissions officer  
22 then moves two boxes down on the same form, as we've shown on  
23 the next slide. And then for some reason -- and according to  
24 SFFA, it is to discriminate against that applicant -- it  
25 gives that person a lower personal rating. That would be a

1 peculiar form of intentional discrimination.

2 And you would have to conclude, Your Honor, that  
3 the admissions officer managed to implement this complicated  
4 scheme, a scheme with inconsistencies and illogical  
5 consequences without leaving behind a single indication, a  
6 single email, a single memo, a single presentation that would  
7 tell the 40 admissions officers just how to navigate these  
8 contradictions and these illogical inconsistencies.

9 But the problems with the plaintiff's  
10 discrimination claim don't end there. There are a host of  
11 other inconsistencies.

12 For instance, as the trial progressed we moved from  
13 intentional discrimination and at the end we're coming to  
14 something that seems to be focusing on implicit bias. And  
15 I'll come back to implicit bias because there's been  
16 virtually no evidence of that.

17 But the fact that SFFA now resorts to implicit bias  
18 demonstrates yet another inconsistency. It's entirely  
19 inconsistent with the proposition that Harvard is  
20 discriminating against some Asian-Americans but favoring  
21 others. How do you implicitly discriminate for someone and  
22 then implicitly discriminate against someone? Another  
23 logical inconsistency.

24 And then to focus on SFFA's primary focus on the  
25 personal rating, the personal rating which they say is a

1 vehicle to carry out the intentional discrimination. The  
2 very same differences in the personal rating, on average --  
3 now, we're just talking about averages here because there are  
4 some Asian-Americans with spectacularly good personal  
5 ratings.

6 But the very same difference they're focusing on on  
7 average is the difference that the ALDC Asian-American  
8 applicants also have. Their personal ratings are also on  
9 average lower, yet they concede there's no discrimination.  
10 Again just another logical inconsistency.

11 Why would they sponsor such a claim? It's a claim  
12 predicated on data mining. It's a claim omitting variables.  
13 It is a claim just ripe with self-defeating inconsistencies.

14 But now the answer is clear, and I would suggest  
15 much clearer than it was at the outset.

16 The answer is that the goal of SFFA is to eliminate  
17 all consideration of race in admissions. The founder of SFFA  
18 pursued that goal in *Fisher* 1. He was unsuccessful. He  
19 pursued that goal on behalf of white plaintiffs in *Fisher* 2.  
20 He was unsuccessful.

21 So what did he do? Mr. Kahlenberg told us. He  
22 advertised for Asian-American plaintiffs, but the goal  
23 remained the same, and that became manifest during the  
24 evidence.

25 Your Honor, the plaintiff's own slides, one that

1 Mr. Hughes didn't show you, tell the entire story. Here is  
2 Plaintiff's Demonstrative 38, Slide 40.

3 You may recall that we cross-examined  
4 Dr. Arcidiacono on this slide. This tells the entire story.  
5 If we were to accept SFFA's proposition that race be  
6 eliminated from consideration, the number of  
7 African-Americans would decrease by 150 a class or 600 over  
8 four-year classes. If we were to accept their analysis, the  
9 number of Hispanics would decrease by 125 per class or about  
10 500. To accept their analysis, the number of  
11 African-American and Hispanic students of color would be  
12 reduced by 1,000 on Harvard's campus.

13 How does SFFA address this? What it says is in  
14 their analysis, and I'm now quoting from Dr. Arcidiacono, the  
15 winners are the Asian-Americans and whites, and the losers  
16 are the African-Americans and Hispanics.

17 Your Honor, he could not be more wrong.

18 If that is the circumstance, we all lose, every  
19 single one of us loses.

20 Now, before we turn to each of SFFA's claims, let  
21 me address why diversity, including racial diversity, is so  
22 critical to the educational experience at Harvard and other  
23 colleges and universities.

24 The plaintiff suggested in its opening that  
25 diversity and its benefits is not on trial here. But as that



1 chart I just showed you indicates it is. If you accept their  
2 proposition, it couldn't be more on trial.

3 In fact, Dr. Arcidiacono spent as much of his time  
4 attacking the tips for African-American and Hispanic students  
5 as he did trying to move the Asian-American penalty.

6 To the plaintiffs, Your Honor, these things are two  
7 sides of the same coin. As their expert said, a tip for  
8 African-Americans and Hispanics is a penalty for  
9 Asian-Americans. That's his use of the word "penalty."

10 But he went one step further. He said a tip, a tip  
11 for whites, for African-Americans, and Hispanics is a white  
12 penalty. That's how they're using these terms.

13 Now, as an initial matter to suggest that one  
14 student is being penalized because another student is  
15 receiving a tip based on her or Hispanic racial background  
16 assumes that the student who received the tip was not  
17 qualified.

18 Nothing could be further from the truth. As the  
19 evidence established, every single student admitted to  
20 Harvard is quite qualified. And as the evidence showed, the  
21 applicant's race may provide a boost only to those very  
22 highly qualified competitive candidates in the pool.

23 That is like many other boosts like geography, like  
24 socioeconomic status, like a music talent. None of these  
25 boosts is imposing a penalty on someone else. And the racial

1 boost benefits everyone on the Harvard campus.

2 Harvard, as you've heard, has long recognized that  
3 the quality, and I'm now quoting from Dean Fitzsimmons'  
4 testimony in *Bakke*. Harvard has long recognized that the  
5 quality of the educational experience of all the students at  
6 Harvard College depends in part on the differences in  
7 background and outlook that the students bring with them to  
8 campus.

9 That was true in 1977 at the time of *Bakke* and is  
10 true today. That is why in 2016, Your Honor, Harvard's  
11 faculty of arts and sciences unanimously endorsed the  
12 conclusion of a committee chaired by Dean Khurana that  
13 reaffirmed, and I quote, "The university's long-held view  
14 that student body diversity, including racial diversity, is  
15 essential to our pedagogical objectives and institutional  
16 mission."

17 This commitment to diversity is shared at the  
18 highest level of the university. But more importantly, Your  
19 Honor, it is lived by the Harvard students. You heard  
20 firsthand from those Harvard students who have experienced  
21 firsthand both the benefits and some of the burdens of a  
22 diverse student body.

23 Their testimony on Monday was powerful. They were  
24 people who volunteered to take the stand and be examined and  
25 cross-examined. They told us why the diversity of Harvard

1 was important to their decision to apply to and attend  
2 Harvard and to their learning while on campus.

3 And most importantly, Your Honor, if we go to the  
4 next slide, Slide 13, they shared how devastating it would be  
5 if the reduction in the diversity, racial diversity, that  
6 would result from plaintiff's so-called alternatives would  
7 come to pass.

8 These students are living proof that Harvard has a  
9 compelling interest in student body diversity. These  
10 students are living proof that taking a thousand  
11 African-American, Hispanic students off the campus in the  
12 guise of an illogical discrimination claim is not the right  
13 result.

14 And as you know, Your Honor, Harvard does not stand  
15 alone on this issue in American higher education  
16 institutions. You heard from President Ruth Simmons, whose  
17 life's story and life's work embodies the meaning, the  
18 importance, the benefits, and the triumph of racial  
19 diversity.

20 As she put it, and I quote, "Diversity provides an  
21 opportunity to deepen that learning, to give students  
22 firsthand experience with difference. Which allows students  
23 to test themselves, to test their background, to test their  
24 ideas, and to challenge assumptions."

25 So with that in mind, let me turn to SFFA's claims.

1 And I'll turn first to the intentional discrimination claim.

2 The law on what's required is clear. And this was  
3 not among Mr. Hughes' slides. The burden is on SFFA to prove  
4 first that Harvard discriminated on the basis of race, to  
5 prove second that the discrimination was intentional, and to  
6 prove third that the discrimination was a substantial and  
7 motivating factor for Harvard's actions.

8 SFFA must prove racial animus, prove it as a  
9 necessary component of the claim. In other words, the  
10 plaintiffs must show that a committee comprised of roughly 40  
11 people at any given time is intentionally trying to  
12 discriminate against some but not all Asian-Americans because  
13 some of those folks are Asian-Americans.

14 Now, SFFA suggests in its opening because Harvard  
15 considers one factor in its admissions process, once the --  
16 and I'm quoting now -- statistically significant Asian  
17 penalty has been shown, the burden is on Harvard to explain  
18 these differences.

19 Quite honestly, Your Honor, that's not the law.  
20 It's confusing the burden of production with the burden of  
21 persuasion. The law is perfectly clear that the ultimate  
22 burden of persuasion remains with SFFA.

23 Now, on the intentional discrimination claim, there  
24 are fundamentally two questions. The first is -- and I'm  
25 going to take them in the order that Mr. Hughes took them --

1 has plaintiff proven discrimination. Because if it's not,  
2 the rest becomes irrelevant.

3 And the second is, has the plaintiff proven the  
4 discriminatory animus required by the law.

5 The answer to both is no.

6 Mr. Waxman will address the evidence that  
7 demonstrates the plaintiff has failed to prove  
8 discrimination, and then I'll return to address the second  
9 question in the remaining claims.

10 I'm going to hand the mic off now.

11 [Microphone technical issues.]

12 MR. WAXMAN: I could see Joan's face.

13 MR. LEE: I realize that folding my arms was a bad  
14 idea.

15 THE COURT: I'll even give you permission to take  
16 your jacket off, if that would help you, if you could talk  
17 without a jacket.

18 MR. WAXMAN: I don't know if I can talk in a court  
19 without a jacket.

20 [Microphone technical issues.]

21 MR. WAXMAN: May I proceed?

22 THE COURT: You may.

23 MS. HACKER: As Your Honor is aware, the plaintiff  
24 relies on statistics to prove its claim of discrimination.

25 Mr. McBride, in the passage here, even said that there's no

1 question that the central issue in this case is being  
2 determined on the basis of statistical analysis. That's  
3 plaintiff's claim because it has nothing else.

4 Of course it is not true that statistics can decide  
5 the question of either discrimination or intentional  
6 discrimination because, as Professor Card explained and  
7 Dr. Arcidiacono did not disagree, the most that statistics  
8 and statistical modeling can prove is a correlation. It can  
9 never prove causation in the real world.

10 But even the bloodless statistics don't support  
11 SFFA's claim.

12 Now, the experts agree that any statistical  
13 analysis can only go so far in modeling Harvard's admissions  
14 process. There are many, many factors that admissions  
15 officers and the admissions committee consider in the process  
16 that simply can't be reduced to numbers and thus can't be  
17 accounted for in any statistical analysis.

18 But as you heard from Professor Card, he tried to  
19 get as close as possible. He included all domestic  
20 applicants in his model, and he included all the relevant  
21 data that he had. And when he did that, he found that  
22 Asian-American ethnicity had no statistically significant  
23 effect in the Harvard admissions process. It had no effect  
24 in any of the six years he looked at or even when he averaged  
25 the six years.

1           Professor Card also found that for applicants who  
2           are female or applicants from California, there was actually  
3           a positive effect associated with being Asian-American. Now  
4           again, these results aren't statistically significant, but  
5           they would surely be a bizarre outcome for an admissions  
6           office trying to discriminate against Asian-Americans.

7           Now, Dr. Arcidiacono reached a different  
8           conclusion. He testified that for some, but not all,  
9           Asian-American applicants he found a penalty. There is a  
10          simple explanation for why two economists using the same type  
11          of model and the same data reached different conclusions, and  
12          it is this: For one methodological issue after another,  
13          Professor Card made the choice that allowed his model of the  
14          admissions process to resemble the actual admissions process  
15          as closely as possible.

16          Dr. Arcidiacono, on the other hand, made choices  
17          that took him further and further away from Harvard's actual  
18          process. He made the choices that instead allowed him to  
19          find the result the plaintiff was looking for.

20          Dr. Arcidiacono, a proclaimed proponent of the mismatch  
21          theory, who believes, in his own words, in a "more efficient  
22          sorting of minority students" manipulated the data to support  
23          his desired result.

24          Now, let me start with the issue of which  
25          applicants are included in the model. Professor Card

1 included all domestic applicants, which is the group that  
2 both sides agree is relevant here.

3 Dr. Arcidiacono threw out of his model a group that  
4 accounts for almost 30 percent of admitted students: the  
5 recruited athletes, the legacy applicants, the applicants who  
6 are on the dean or director's list, and the children of  
7 Harvard faculty and staff, the so-called ALDC applicants.

8 Now, there are two important questions to ask about  
9 why Dr. Arcidiacono made that choice. The first, why did he  
10 claim to do it. The answer you heard him give is that the  
11 ALDC applicants received tips in the admissions process. But  
12 of course so many other groups receive tips, and yet he  
13 didn't exclude any of those applicants from his model.

14 Dr. Arcidiacono also said that he excluded ALDC  
15 applicants because they have high admission rates. He told  
16 Your Honor that he needed to exclude the ALDCs so he could  
17 compare "apples to apples."

18 That is nonsense. One might as well say that  
19 people with low SAT scores can't be compared as apples to  
20 apples with people with high SAT scores.

21 The whole point of a regression is to allow  
22 apples-to-apples comparisons among people with different  
23 characteristics by controlling for those characteristics.

24 Now, the second question is why did Dr. Arcidiacono  
25 actually choose to exclude ALDC applicants. And I think here



1 the answer is pretty clear. He did it because doing so  
2 produced the result he wanted. He did it because among ALDC  
3 applicants he agrees that Asian-American applicants are  
4 admitted at a higher rate than white applicants.

5 That is why the first sentence of the plaintiff's  
6 opening statement in this case is what you see on the screen.  
7 The evidence in this trial will show that Harvard College  
8 discriminates against Asian-American applicants, specifically  
9 those applicants ineligible for Harvard's sizeable  
10 professions for recruited athletes, the children of its  
11 alumni, major donors, and its faculty.

12 As Your Honor recognized, Asian-Americans are not  
13 only not being discriminated against in these categories,  
14 they're actually being favored.

15 As Professor Card testified, for legacy applicants,  
16 the largest component of the ALDC group by far, that  
17 advantage is a statistically significant one.

18 That is a fact that Mr. Hughes tried deftly to  
19 obscure in his statements this morning. Were there any doubt  
20 about Dr. Arcidiacono's motives for removing the ALDC  
21 applicants from his file, that issue was put to rest when  
22 Mr. Lee asked him about the early action applicants.

23 You may recall that Dr. Arcidiacono said that the  
24 reason he removed ALDC applicants was their high admission  
25 rates.

1           Now, early action applicants also have high  
2 admission rates, between six and seven times higher than  
3 regular applicants. And in fact, Dr. Arcidiacono initially  
4 excluded those applicants from his model for that very stated  
5 reason. But then he put those early action applicants back  
6 into his model after he realized that Asian-Americans were  
7 not being admitted at higher rates within that group.

8           He quite simply went looking across the data. He  
9 saw some groups where Asian-Americans did better than white  
10 applicants. He saw some groups where they did worse.

11           And rather than analyzing all of those groups  
12 together, as Professor Card did, he decided to throw out the  
13 groups where the Asian-American applicants did better.

14           That is unabashed data mining, and the result is  
15 that because Dr. Arcidiacono excluded ALDCs from his  
16 analysis, SFFA has no statistical evidence of discrimination  
17 against Asian-Americans in the applicant pool as a whole.  
18 Absolutely none.

19           The sole theory of discrimination that SFFA has  
20 advanced is that Harvard discriminates against only those  
21 Asian-Americans who are not athletes, not legacies, not on  
22 the dean's or director's list, and not children of Harvard  
23 faculty or staff.

24           As Your Honor's questions to Dr. Arcidiacono  
25 recognized, that theory makes no sense. If Harvard really

1 bore discriminatory animus or even implicit bias towards  
2 Asian-American applicants, a premise on which SFFA's theory  
3 depends, why would it discriminate against only  
4 Asian-Americans who are not ALDCs? That is a fatal weakness  
5 in SFFA's case.

6 And indeed, if as it now appears from Mr. Hughes'  
7 statement this morning, the plaintiff is relying only on a  
8 theory of implicit bias in admissions, its concession that  
9 admissions officers do not discriminate against ALDC  
10 applicants renders that theory incoherent.

11 Now, before I move on, I want to address something  
12 else we've heard from the plaintiff, which is the suggestion  
13 that ALDCs are not as strong as other applicants or that  
14 academic or other success matters less for their admissions  
15 chances.

16 That is simply not true. ALDCs as a group are  
17 rated higher, much higher on every dimension in the data.

18 Now let me turn briefly to the issue of pooling;  
19 that is, the question of whether it's proper to run a single  
20 model for all six years of data or to model each year  
21 separately.

22 Professor Card, as Your Honor will recall, ran his  
23 model separately for each admissions cycle because that's how  
24 the process works. The applicants in each year compete  
25 against other applicants in that year. They don't compete

1 against applicants in other years. And running a model  
2 year-by year, Dr. Card explained, also allows him to examine  
3 the effect of early action because for some years Harvard did  
4 have early action. For others it did not. And with respect  
5 to changes in the coding of parental occupation categories,  
6 it also allows his model to see exactly what the admissions  
7 officers saw in each year as opposed to a pool model which  
8 does not.

9 Now, the only reason that Dr. Arcidiacono gives for  
10 his approach is he says it gave his model more statistical  
11 power or made it more precise.

12 But as you heard Professor Card explain, that's  
13 just not true. Professor Card doesn't just use his  
14 year-by-year models, he also averages the results from those  
15 models across all six years. And when he does that, his  
16 estimates are actually more precise and his model actually  
17 has more statistical power than Dr. Arcidiacono's.

18 Let me turn next to the issue of omitted variables,  
19 and I'll ask by -- I'll start by asking Your Honor to think  
20 back to the hypothetical that Professor Card described on the  
21 whiteboard about the likelihood that somebody will retire in  
22 the next year.

23 The point that example was trying to illustrate is  
24 that if a regression does not include every variable that  
25 would affect the outcome, then you can't infer from any

1 regression estimate that the factor in question actually  
2 caused the estimated change. That is why it is so important  
3 that Professor Card includes in his model so many of the  
4 factors for which data exists.

5 By contrast, Dr. Arcidiacono did not. He omitted  
6 four factors: intended career, parental occupation, whether  
7 the applicant received a staff interview, and the personal  
8 rating. Those four factors have one thing in common. They  
9 turn out to make a big difference in the results.

10 Let me talk first about the parental occupation and  
11 intended career. Dr. Arcidiacono admits that parental  
12 occupation and intended career are factors that are  
13 considered by the admissions office. They're on the summary  
14 sheet. And so here, too, by choosing to omit those variables  
15 he was taking his model farther away from the actual process.

16 His supposed reason for excluding those factors was  
17 the fact that some of the data vary from year to year. But  
18 other categories also vary from year to year, but  
19 Dr. Arcidiacono did not exclude them. He excluded those  
20 other ones.

21 And as you heard Professor Card explain,  
22 year-to-year variation is a commonplace feature of data like  
23 this. It is no reason to exclude these factors which the  
24 evidence shows are important factors in the admissions  
25 decision.

1           Now, Dr. Arcidiacono also excluded the fact of  
2           whether an applicant had a staff interview. His reason for  
3           doing that was that ALDC applicants are more likely to  
4           receive staff interviews than non-ALDC applicants.

5           But that's not a reason to exclude the factor any  
6           more than it's a reason to exclude any other factor that is  
7           correlated with ALDC status, because it is a reason to  
8           include that factor so that the ALDC effect can be controlled  
9           and because the fact of a staff interview does affect  
10          admissions decisions.

11          The effect of pulling each of these variables out  
12          of his model was that it allowed Dr. Arcidiacono to find an  
13          increasingly negative effect of Asian-American ethnicity.

14          And now let me turn to the personal rating, which  
15          it now appears is all of the plaintiff's case here.

16          Mr. Hughes has suggested that the differences  
17          between average ratings of applicants by race indicates bias.  
18          But as our demonstrative 10.10, which is on the screen,  
19          shows, there are differences in all four ratings, and that  
20          does not mean there is bias.

21          By removing the personal rating, Dr. Arcidiacono  
22          was able to make the negative effect even greater.

23          Now, the personal rating has obviously been a focus  
24          for both parties from the start, and the reason is that it is  
25          important. As you've heard from all of the admissions

1 officers, one of the things that they are trying to assess is  
2 what type of classmate or roommate an applicant might make.  
3 What qualities does she or he bring to the campus.

4 The admissions officers pour over essays,  
5 recommendation letters, alumni interview reports, and other  
6 materials in an effort to learn more about who the applicants  
7 are. The personal qualities expressed in those materials and  
8 reflected in the personal rating and nowhere else are  
9 critically important to deciding who will be admitted. And  
10 because the information reflected in the personal rating is  
11 so important to the process, it makes a big difference to the  
12 result of the model whether or not that rating is included.

13 Removing the personal rating means depriving the  
14 model of a plethora of information about what admissions  
15 officers actually consider.

16 But by removing the personal rating from his model,  
17 Dr. Arcidiacono was able to find the Asian penalty he was  
18 looking for. There is no justification for removing it.

19 Both experts agree that if race is directly taken  
20 into account in determining a variable, that variable should  
21 be excluded in a model that is trying to assess the effect of  
22 one's race. That is why both experts excluded the  
23 preliminary overall rating in constructing their models  
24 because admissions officers have clearly stated that race  
25 itself may be considered in that factor.

1           That is emphatically not true of the personal  
2     rating. Every single admissions officer testified that an  
3     applicant's race itself is not considered when assigning the  
4     personal rating. That testimony was consistent and  
5     undisputed.

6           The personal rating does not reflect the fact that  
7     an applicant has self-identified as belonging to a particular  
8     race.

9           The fact that admissions officers may consider  
10    whether an applicant has overcome discrimination or other  
11    things when assigning the personal rating is not considering  
12    the applicant's race when assigning that rating. It's  
13    considering qualities such as the applicant's determination,  
14    perseverance, grit, and many other personal qualities that  
15    are revealed in that instance.

16          Now, Dr. Arcidiacono says he removed the personal  
17    rating because he inferred that the rating itself reflected  
18    bias against Asian-Americans. To be clear, what he found was  
19    that Asian-American ethnicity was associated with slightly  
20    lower personal ratings on average. He found on average a  
21    negative correlation.

22          That is decidedly not the same thing as finding  
23    that the correlation he observed could properly be attributed  
24    to bias, as OCR's own report which noticed the same negative  
25    correlation and nonetheless concluded that there was no



1 evidence of bias in the admissions process against  
2 Asian-Americans.

3           Importantly, Dr. Arcidiacono also found that  
4 Asian-American ethnicity was associated with better academic  
5 and extracurricular ratings, controlling for the factors in  
6 his model. That means that his rating models show that  
7 Asian-Americans are getting higher academic ratings, higher  
8 extracurricular ratings than equally situated white  
9 applicants, but slightly lower personal ratings.

10           The question is whether the correlations  
11 Dr. Arcidiacono found in these ratings are attributable to  
12 racial bias or just reflect factors that aren't controlled  
13 for in the model.

14           So let's think for a moment about what it would  
15 mean if the correlations really did reflect the consideration  
16 of race.

17           As Mr. Lee showed you earlier and Dr. Arcidiacono  
18 agreed, this means that admissions officers are giving  
19 Asian-American applicants better ratings in the first two  
20 boxes than can be explained by any data in the model.  
21 Remember, it's the same admissions officer filling out all  
22 four boxes.

23           Dr. Arcidiacono would have you believe that the  
24 same admissions officer is deliberately -- or exercising some  
25 stereotypical bias, deliberately giving Asian-American

1 applicants a better academic rating, a better extracurricular  
2 rating only to move two boxes over and give them a worse  
3 personal rating than the data can explain.

4 16 leading economists, including two Nobel Prize  
5 winners and Janet Yellen, the former chair of the federal  
6 reserve, agreed that that conclusion is nonsense. They  
7 explained in a brief to this Court, and I'm quoting,  
8 "Dr. Arcidiacono's finding are implausible because they would  
9 indicate that Harvard discriminates against Asian-American  
10 applicants on one subscore only to turn around and  
11 discriminate in their favor on two others.

12 "The better and more plausible explanation of these  
13 findings," they conclude, "is that Dr. Arcidiacono's  
14 regression models are simply not reliable enough to measure  
15 most of the applicant qualities that drive Harvard's  
16 assignment of these ratings."

17 And that indeed is the very interpretation that  
18 Dr. Arcidiacono himself gave for the positive correlations he  
19 found in his models of the academic and extracurricular  
20 ratings. He didn't attribute the better academic and  
21 extracurricular ratings that admissions officers give to  
22 Asian-American applicants as an Asian preference. He said  
23 simply that those better scores reflect factors that aren't  
24 captured in the data.

25 And the reason he said that is because that

1 Asian-American applicants are stronger than white applicants  
2 on measures of academic and extracurricular excellence in the  
3 data like SAT scores. As he explained, economists generally  
4 operate under the assumption that observable characteristics  
5 operate in a similar manner to unobservable characteristics.

6 So because he found that Asian-American applicants  
7 were stronger on measures of academic and extracurricular  
8 strength in the data, he assumed they must also be strong on  
9 measures of strength in those areas outside the data which  
10 would account for the positive correlations he found.

11 He was right about that. Professor Card doesn't  
12 disagree. And Dr. Arcidiacono should have interpreted the  
13 personal rating regression in the same way.

14 But instead, Dr. Arcidiacono interpreted the  
15 negative effect of Asian-American ethnicity that he found in  
16 his personal rating regression to be the result of bias.

17 Now, what reasons did he give for those  
18 inconsistent interpretations? He said that for the personal  
19 rating, like the academic and extracurricular ratings,  
20 Asian-American applicants are stronger on the factors in the  
21 data that affect the rating. So they're presumably also  
22 stronger on the many factors admissions considers that are  
23 outside the data.

24 That is just not true. Asian-American applicants,  
25 as Dr. Card painstakingly demonstrated, are not stronger on

1 the non-academic factors in the data that affect the personal  
2 rating. Professor Card showed you slide after slide  
3 explaining how the data disproved Dr. Arcidiacono on this  
4 point. He showed you that Asian-American applicants have  
5 weaker school support ratings, the teacher and guidance  
6 counselor ratings, than white applicants of equal academic  
7 strengths.

8 Those teacher and guidance counselor ratings inform  
9 the personal rating. The same holds true if you add alumni  
10 ratings to the school support ratings. Asian-American  
11 applicants do slightly less well than white applicants. And  
12 he showed you that if you look across all of the observable  
13 non-academic factors in the model, Asian-American applicants  
14 are less strong than white applicants of equal academic  
15 strength.

16 Now let me reiterate. Dr. Arcidiacono's  
17 explanation for why he concluded the personal rating was  
18 bias, why he threw it entirely out of his model, was his  
19 conclusion that Asian-American applicants are stronger on the  
20 factors in the data that inform the personal rating.

21 And he therefore inferred that only bias, not  
22 factors outside the data, could explain the negative  
23 association between Asian-American ethnicity and the personal  
24 rating.

25 But Asian-American applicants are not stronger on

1 the factors in the data that inform the personal rating.  
2 Applying the same generally accepted economic principle that  
3 he applied to the academic and extracurricular ratings, the  
4 conclusion that Dr. Arcidiacono should have drawn, the one  
5 that Professor Card properly drew, is that the explanation  
6 for why Asian-Americans do less well on the personal rating  
7 is not bias. It is the many, many factors considered by  
8 admissions that the model cannot control for.

9 But finally, as Dr. Card explained, let's just  
10 suppose he is wrong about this and suppose that the  
11 correlations that Dr. Arcidiacono found for the three ratings  
12 actually are attributable to race, racial bias, or racial  
13 stereotyping and not simply factors outside the data. Would  
14 the ratings have to be thrown out of the model? The answer  
15 is no.

16 You repeatedly heard Mr. Hughes tell you this  
17 morning that the answer is yes. That is just not correct.

18 As Professor Card explained, throwing out the  
19 ratings would discard a great deal of helpful information  
20 about the applicant that both experts agree is important to  
21 the process. Is the applicant a leader? Does she offer  
22 assistance to her peers? Does he have a determined spirit?

23 Rather than throwing out that information, the  
24 right approach is to simply remove the effect of race found  
25 in Dr. Arcidiacono's models from the ratings, keeping the

1 remainder of the ratings intact.

2 When Professor Card did that and used the adjusted  
3 ratings in his admissions model, the results were entirely  
4 consistent with those of his main model. He still found no  
5 evidence of bias.

6 Now, let me emphasize two -- before I turn the  
7 podium over to Mr. Lee, emphasize two additional points  
8 regarding the personal rating.

9 Number one, Mr. Hughes and Dr. Arcidiacono hinged  
10 their claim of personal rating bias on the charts that showed  
11 that Mr. -- that Mr. Hughes showed again this morning,  
12 comparing the personal ratings to the academic index.

13 But as Dr. Card explained conclusively, the  
14 personal rating has almost no correlation at all to the  
15 academic index or to academics at all. And that is revealed  
16 on, I believe, our demonstrative 65.

17 One additional point -- yes, here it is. The  
18 correlation that his misleading charts purported to show  
19 between the academic index decile and the personal rating, in  
20 fact, when revealed on the proper same scale shows almost no  
21 correlation whatsoever between the personal rating and the  
22 academic index or academics more generally.

23 Now, one additional point that Dr. Card raised  
24 regarding the personal rating, and that is the fact that for  
25 both the ALDC and the non-ALDC applicants, Asian-American

1 applicants have lower personal ratings than white applicants.  
2 Mr. Lee touched on this, and let me just expand a little bit.

3 The difference in the gap on personal ratings  
4 between Asian-American applicants and white applicants is --  
5 not only exists in the ALDC group, it is greater for the ALDC  
6 group. In other words, the Asian-American ALDCs are farther  
7 behind the white ALDCs in terms of the personal rating than  
8 is true for the non-ALDC applicants.

9 That again drains any coherence from SFFA's claim  
10 that the personal rating is the vehicle being used to  
11 discriminate against Asian-American applicants. It's simply  
12 inconceivable to think that the personal rating is being used  
13 as an engine for discrimination. When Asian-Americans who  
14 are ALDCs, a group that SFFA concedes Harvard does not  
15 discriminate against -- that was Mr. Mortara's very first  
16 sentence in this trial -- they are also getting even lower  
17 personal ratings than their white counterparts.

18 Now, I acknowledge, and I'm sure both parties  
19 regret the fact that a lot of data has been thrown at Her  
20 Honor in this case. But all you really need to take away is  
21 that one expert was trying to model the process and the other  
22 was not.

23 Professor Card is the expert who tried to model the  
24 process. The result was a durable finding that there was no  
25 evidence of discrimination.

1 Dr. Arcidiacono, on the other hand, made choice  
2 after choice after choice after choice designed to move  
3 further away from the actual admissions process in order to  
4 find evidence of discrimination. His findings would not be  
5 sufficient to support a finding of intentional discrimination  
6 or discrimination even if they were reliable.

7 But they are not reliable. They are manipulated.  
8 Dr. Arcidiacono selectively, purposefully eliminated  
9 legitimate factors in the admissions process in order to  
10 suggest an illegitimate outcome.

11 MR. LEE: I promise not to fold my arms.

12 Your Honor, now that Mr. Waxman has explained that  
13 the evidence is not sufficient for SFFA to carry its burden  
14 to show that Harvard is discriminating, let me turn to the  
15 question of discriminatory intent.

16 Now, to state the obvious, if there was  
17 discriminatory animus, why would it be directed only to  
18 certain categories of Asian-American applicants? Why would  
19 athletes, legacies, dean's list, director's list, faculty  
20 children, children of staff, Asian-American women,  
21 Asian-Americans from California, why would they not be  
22 discriminated against but others are?

23 Probably more importantly, where is the evidence  
24 that shows that this bizarre scheme was implemented in any  
25 intentional or even unintentional way. We would suggest that



1 having seen the witnesses you've seen, you've seen the  
2 opposite of intentional discrimination.

3 The officer, the admissions officers took the  
4 stand. They have testified unequivocally that they have  
5 never witnessed any discrimination or bias in the admissions  
6 process. These admissions officers, everyone from Ms. Bever  
7 who's been in the office for four years to, say, Mr. Banks  
8 who's been there for closer to 40, described an open,  
9 collaborative, iterative process designed to ensure that each  
10 applicant gets a full and fair review.

11 Every one of the 40,000 applicants can be put back  
12 into play at any point in the process. Any admissions  
13 officer can at any point in the process request that any  
14 application be discussed. And when they are, they're  
15 discussed in subcommittee and committee openly with all of  
16 the information, quantitative and qualitative, available to  
17 everyone.

18 In fact, you heard Ms. Bever describe just what  
19 happened with Ms. Sally Chen's application. In the interests  
20 of time I'm not going to go through the details, but it was a  
21 wonderful example of the consideration of an application by a  
22 group of people who ultimately came to the correct decision  
23 and admitted Ms. Chen. But it was only the result of an  
24 iterative and open process.

25 This is not a process where discrimination and

1 racial animus could go unnoticed. It is a process replete  
2 with checks and balances. It is a process that relies upon  
3 transparency and open discussion. It is a process that  
4 relies upon 40 votes of individuals, many of whom Your Honor  
5 saw and got to see testify.

6 Now, as part of this process, the admissions office  
7 considers all the information available. If the applicant  
8 chooses to provide information about his or her race, that  
9 fact is considered alongside all the other pieces of  
10 information in the file. Race is considered as one of many  
11 factors.

12 For some competitive applicants, the tip of race  
13 may make a difference. The admissions officers were  
14 consistent. But race is never used to deny admission to  
15 anyone. Race is never a negative factor. The admissions  
16 officers don't think in Dr. Arcidiacono's terms of winners  
17 and losers.

18 This very process was praised in *Bakke* by the  
19 Supreme Court as an illuminating example. Now, I understand  
20 that SFFA thinks that this is somehow humorous or a joke, but  
21 it's not. It's law of the land. They might want it to be  
22 different, but it is our law. This process is the same  
23 process that was examined by the Department of Education's  
24 Office For Civil Rights in 1990.

25 Now, SFFA has yanked from context a sentence here,

1 a sentence there, and tried to tie it to deposition testimony  
2 and suggest something other than what the document says.

3 Your Honor has it.

4 What the document is, is this: OCR reviewed 400  
5 application files, they reviewed 2,000 application summary  
6 sheets, they interviewed 10 admissions officers, and they had  
7 data on 110,000 applicants and even did their own regression  
8 analysis.

9 After all that, at the end of the document which  
10 had the statements that Mr. Hughes relied upon, what did it  
11 find? Harvard did not discriminate against Asian-Americans.

12 Now, to be clear, OCR's analysis found, just as the  
13 experts have found in this case, that there was on average a  
14 slight difference in the personal ratings for Asian-American  
15 and white applicants. On average, Asian-Americans received a  
16 slightly lower personal ratings, the difference between 25  
17 and 20 percent.

18 But then, Your Honor, OCR did what SFFA didn't  
19 bother to do. OCR didn't just notice a negative coefficient  
20 of Asian-American ethnicity and then say we assume bias. It  
21 conducted an audit of hundreds of admissions files, hundreds  
22 of summary sheets, looking for actual evidence of bias. It  
23 found none.

24 They compared the ratings assigned to the  
25 application materials they reviewed, and here's their

1 finding: "Our comparison of the personal qualities ratings  
2 to the supporting material in the applicant files revealed no  
3 apparent inconsistencies between the ratings and the  
4 underlying documentation."

5 That is the way to investigate a claim of bias, not  
6 to simply jump to the conclusion that bias is the answer.

7 When OCR did the real work, it concluded, just as  
8 Dr. Card did, that there is no evidence that this discrepancy  
9 was the result of any discrimination.

10 To reiterate, Your Honor, they had the files that  
11 Your Honor ordered produced. They had the files for their  
12 standing members. If they wanted to do this audit to support  
13 their claim, they could have done it.

14 Dr. Arcidiacono could have put those files into  
15 evidence. They did not. And there's only one inference that  
16 can be drawn from that is that those files would not support  
17 the convoluted claim they're offering you today.

18 Now, Harvard's current admissions process is, in  
19 general, the same process that's described as we said  
20 repeatedly. It's the same process that was examined again in  
21 2001 when there was another complaint. It's the same process  
22 that was mentioned favorably in *Grutter*. And it is largely  
23 the same process today.

24 Now, confronted with this unbroken line endorsement  
25 of Harvard's process over 50 years, where does that leave

1 SFFA? It's left with the suggestion that Harvard's process  
2 is not formulaic enough. It's not specific enough. They're  
3 not stringent written directives.

4 I would suggest that if they had stringent written  
5 directives, they would be making the other claim, which is  
6 they're too mechanical and not flexible enough.

7 For two weeks, the plaintiffs asked admissions  
8 officer after admissions officer about the fact that there  
9 were no specific guidelines to take into consideration as  
10 part of Harvard's whole-person review.

11 For the discovery period, Your Honor, which  
12 extended though August 2014 and the class of 2019, everybody  
13 testified consistently and it's consistent with the record.  
14 There was nothing addressed in this specific issue. At the  
15 very end, the reading procedures for the class of 2023 became  
16 an issue.

17 It is true that after SFFA sued, the admissions  
18 office did not go out of business. It is true that they  
19 continued to review applications. It is true, as Your Honor  
20 learned yesterday, that every year the reading procedures  
21 were revised.

22 And it's true that on October 5 of this year a new  
23 set of reading procedures were issued that said that race can  
24 be considered in the preliminary overall rating as one factor  
25 among many but that it cannot be considered in the personal

1 rating.

2 It is nothing more than a codification of what Your  
3 Honor heard the admissions officers testify had been the  
4 practice before.

5 Now, I just want to say one additional thing about  
6 the reading procedures. For the first time today in this  
7 case, there was argument that somehow the reading procedures  
8 are relevant to liability.

9 Your Honor allowed the recall of witnesses to the  
10 extent it might demonstrate some indication of a witness'  
11 credibility.

12 Rule 407 precludes the very argument they made  
13 today. They cannot make that argument. It's an argument  
14 that is precluded by the rules of evidence that govern this  
15 case.

16 But the reading procedures at the end are only a  
17 small part of the admissions officer's training. You've  
18 learned a lot about it. You've learned that the new  
19 admissions officers receive training at the outset, that  
20 their first 50 to 100 files are reviewed by another reader.  
21 You learned about the casebook and the casebook guidance.

22 And we walked you through an example in the  
23 casebook, two examples, one of a student named Grace, who is  
24 on Slide 54, and one who is a student named Peter, on  
25 Slide 55.

1 I'm not going to walk through them today because we  
2 did it during the course of the evidence. But the suggestion  
3 that these casebook examples and the casebook guidance don't  
4 provide the instruction on how to employ the multifactor test  
5 is simply incorrect.

6 In fact, for all of us as lawyers, we largely learn  
7 by case studies. We learn from looking at specific case  
8 studies and drawing conclusions from them. That is precisely  
9 what happens at the Harvard admissions office. These are  
10 real cases drawn from real applicants with their names  
11 changed. And then the casebook allows the admissions  
12 officers to determine just how the multifactor test should be  
13 applied.

14 The admissions officers also receive the  
15 interviewer handbook which have the tips that they are to be  
16 looking for. And each year the entire office receives  
17 training from the Harvard office of the general counsel  
18 concerning the legal limitations on how race can properly be  
19 considered in the admissions process.

20 And in addition, Your Honor, periodically the  
21 office gives trainings like those discussed by Ms. Ray in her  
22 testimony that provide information to admissions officers  
23 giving the experience of students of color in the United  
24 States so they have the benefit of their context of the  
25 discussions.

1           It is through all of these materials and all of  
2           this training and all of this collaborative work that the 40  
3           individuals would do the admissions process come together to  
4           vote and admit each of the incoming Harvard classes.

5           Now, the one thing that SFFA points to as evidence  
6           of discrimination are the search lists.

7           It's a really -- respectfully, and I respect  
8           Mr. Hughes a great deal. It's a disingenuous argument.

9           The exhibit that they gave you has a top and a  
10          bottom. The bottom has the ACT cutoff levels.

11          As Dean Fitzsimmons testified, for people in Sparse  
12          Country, particularly in rural portions of Sparse Country,  
13          the ACT is the more common test. On the very same document  
14          that they claim is discriminatory, the ACT cutoff is the same  
15          at 30.

16          And in the document that Dean Fitzsimmons talked  
17          about that followed, we saw another year where the cutoff  
18          actually for Asian-Americans was lower than whites in Sparse  
19          Country. This is no evidence of discriminatory intent.

20          So let me now turn to a big focus of what SFFA has  
21          focused on, and that's OIR. Now, to be clear, Your Honor,  
22          this has been a moving target. And I think the fact that  
23          it's been a moving target speaks volumes.

24          In opening statements, SFFA showed you these pages  
25          from Exhibit 9. They pointed you to these two slides in



1 opening. These are the same pages that SFFA cross-examined  
2 Mr. Hansen about.

3 And in opening, this is what SFFA said about these  
4 pages. "Harvard's own researchers told Dean Fitzsimmons that  
5 there was a statistically significant penalty on  
6 Asian-Americans applying to Harvard," referring to these  
7 specific pages.

8 We now know that's simply not true. Dean  
9 Fitzsimmons never saw these pages. That is undisputed.

10 Mr. Hughes's conjecture about other evidence that  
11 might have indicated that he did is simply that. The  
12 information on the very slides that was the core of their  
13 opening never got to the dean. Period.

14 Now, there are models that were, in fact, shown to  
15 Dean Fitzsimmons, and Your Honor has seen them and we've  
16 talked about them repeatedly. The work that OIR did was work  
17 regarding the demographics of Harvard's admitted class, and  
18 it was to be sure, in part, prompted by the Unz article.

19 That article, as Your Honor now knows, was very  
20 controversial. It criticized people of all ethnic,  
21 religious, and racial backgrounds equally.

22 As Dean Fitzsimmons explained, he heard from many  
23 alumni who were particularly upset and concerned about the  
24 deeply anti-Semitic comments in the article. Many of the  
25 privilege log entries are dealing not with just

1 Asian-American penalties on their face, but the Unz article,  
2 and the Unz article had broader implications.

3 Now, OIR did do some work. And what it found, as  
4 Your Honor now knows, is that Model 1 demonstrated if  
5 admissions decisions were based only on academic factors, the  
6 admitted class would have a higher percentage of  
7 Asian-American students than it does. No one has ever  
8 disagreed with that or disputed that.

9 Models 2 and 3 show that the more factors that are  
10 added, the representation -- the more factors that are added  
11 results in the representation of Asian-Americans decreasing.  
12 No one has ever disputed that as well.

13 Now, Model 4 got a lot of attention, but I think at  
14 the end of the day we realize that that model itself is a  
15 little circular. Its input is demographics, its output is  
16 demographics, and that's the reason, as was explained to Your  
17 Honor, that the results are so close to the actual class.

18 But as Dean Fitzsimmons said, when he saw this, it  
19 was not inconsistent with what he understood before, which is  
20 if it were just grade point averages and board scores, there  
21 would be more Asian-Americans. He's never disagreed with  
22 that, and he said it on the stand.

23 But he also said that the more factors you add  
24 in -- and this is only a handful of factors -- the closer you  
25 get to the class that Harvard has.

1           Against the backdrop of *Bakke*, the OCR  
2           investigation, the second OCR investigation, and everything  
3           else that had occurred, this didn't tell Dean Fitzsimmons  
4           something that he didn't know before. And as he's testified  
5           and as even Mr. Kahlenberg, their expert, has acknowledged,  
6           Dean Fitzsimmons has a reputation for having been a pioneer  
7           in opening up the admissions office of educational  
8           institutions to people of different ethnicities and different  
9           socioeconomic backgrounds.

10           The idea that he would take this and have an alarm  
11           bell go off and do nothing is simply implausible.

12           In fact, what he did do is in late 2013 he asked  
13           OIR to do an analysis to confirm that the admissions office  
14           was giving a tip to low-income applicants. He got that.

15           But then he went another step. After receiving  
16           that analysis, he specifically asked for follow-up regarding  
17           whether the tip for low-income applicants was being applied  
18           consistently across all racial and ethnic groups. The answer  
19           was it was.

20           In fact, the results showed that Asian-Americans  
21           were getting as large a tip for being low income as almost  
22           any group. As Slide 64 demonstrates, the admit rates for  
23           low-income Asian-Americans was 10 percent as compared to  
24           7 percent for non-low-income Asian-Americans, a 3 percent  
25           increase.

1           Now, we can quarrel about who got the larger  
2           increase and who didn't, but this is just another place that  
3           demonstrates the illogic in SFFA's claims. If Harvard were  
4           trying to discriminate against Asian-Americans, why would it  
5           give the largest percentage tip to low-income  
6           Asian-Americans?

7           Now, SFFA has suggested Dean Fitzsimmons should  
8           have done more, that he should have commissioned or requested  
9           the full analysis that Dr. Card has now done.

10          There are three responses to this. Dean  
11          Fitzsimmons testified that he has been vigilant about  
12          ensuring that his process is not infected by bias and  
13          discrimination.

14          When he got this information, he knew that what he  
15          needed to do was to continue what he had done before, and he  
16          told you that he did. No one suggested to him that these  
17          results showed discrimination. No one suggested that these  
18          results proved discrimination. No one involved in the  
19          process sounded the alarm bell that SFFA seems to think  
20          should have gone off.

21          The second thing is that to the extent SFFA wants a  
22          more thorough analysis, it's been done now. It was done by  
23          Dr. Card. And Dr. Card concluded that there is no evidence  
24          of discrimination against Asian-Americans.

25          But the third is this: This effort to cobble

1 together a line from a deposition here, a line from a  
2 document here over a period of 10 or 15 years and suggests  
3 that, ah-ha, this is evidence of intentional discrimination  
4 just doesn't work.

5 This is Monday morning quarterbacking looking back  
6 at a series of events that occurred before and saying I can  
7 ignore the context, I can ignore what the dean knew.

8 I can pull out a sentence or two here and say he  
9 should have done more. Or he should have done more, even if  
10 they're right, isn't intentional discrimination.

11 Let me briefly address two issues that the  
12 plaintiff has raised late in the trial. The first is  
13 implicit bias. Mr. Waxman and I both touched on this. Let  
14 me say three things:

15 First, there was no evidence to suggest that anyone  
16 in Harvard's admissions office harbored any implicit bias  
17 against Asian-Americans. There are experts in implicit bias.  
18 We didn't hear one. The only person to basically bring  
19 together the implicit bias case was Mr. Hughes. But that's  
20 insufficient to carry their burden of showing implicit bias.

21 Second, the claim makes no sense. How do you  
22 implicitly bias yourself against some Asian-Americans but  
23 implicitly or explicitly bias yourself in favor of other  
24 Asian-Americans? If it sounds like it doesn't make sense,  
25 it's because it doesn't.

1           Now, third, the law that they've showed you  
2 actually is incorrect.

3           Mr. Hughes put on the screen a citation from the  
4 *Columbus Board of Education v Penick*. He argued that actions  
5 having a foreseeable despaired impact are relevant to proving  
6 an unconstitutional purpose.

7           What you didn't hear, Your Honor, is on the very  
8 same page of that case, at 443 U.S. 464, the Supreme Court  
9 reemphasized that disparate impact in foreseeable  
10 consequences without more do not establish a violation.

11           And the court, the Supreme Court, made the very  
12 same in the same year in *Massachusetts v Feeney*. There  
13 aren't slides because we didn't quite know this was coming  
14 up, but it's 442 U.S. 254 where the Supreme Court stressed  
15 that intentional discrimination occurs only when the  
16 decision-maker acts -- and I now quote -- "because of, not  
17 merely in spite of, adverse effects on an identifiable  
18 group."

19           In other words, it's not enough for SFFA to show  
20 Harvard might have been aware of differential outcomes or  
21 even that someone has suggested that they could be  
22 differential outcomes. SFFA needs to prove that Harvard  
23 acted for the deliberate purpose of obtaining that result,  
24 and they cannot do that.

25           The last point, Your Honor, on intentional

1 discrimination is this: I want to turn to the attack on the  
2 credibility that we've heard this morning of the Harvard  
3 leadership, of the Harvard admissions officers, and near as I  
4 can tell, Harvard's lawyers.

5 There's an old saying among trial lawyers, which  
6 Her Honor as heard before, if the facts are on your side,  
7 argue the facts. If the law is on your side, argue the law.  
8 If you have neither the facts or the law, attack, attack,  
9 attack.

10 And that's what we've had today and for three  
11 weeks. It's what the plaintiff has done at every turn. It  
12 is easy to attack when you yourself are never going to get on  
13 the stand and be cross-examined. It has attacked Harvard, it  
14 has attacked Harvard's witnesses, and apparently now counsel.

15 But, Your Honor, again, if you trace the history,  
16 the attacks speak volumes themselves. In its summary  
17 judgment filings, the plaintiff accused Dean Khurana of  
18 killing the work done by OIR, and I quote, "burying the  
19 reports." But as Your Honor now knows, it turns out not to  
20 be true.

21 At the pretrial conference, the plaintiff claimed  
22 that President Faust's credibility was in doubt and could not  
23 be trusted because of a statement she made about Jewish  
24 discrimination in the 1920s. That too was a meritless attack  
25 on the reputation of a dedicated academic leader.

1           It alleged that Dean Smith led a sham committee, to  
2     quote them. I think the evidence demonstrates that's false  
3     as well.

4           And then yesterday it was the suggestion that  
5     Marlyn McGrath didn't bring out facts about the October 5  
6     email and reading procedures, reading procedures that are  
7     good for Harvard, that demonstrate in this case which  
8     requests only prospective relief that Harvard is acting just  
9     as it said it has acted.

10          And you've heard the plaintiff attack Dean  
11     Fitzsimmons, whom SFFA has accused of intentionally  
12     discriminating against Asian-Americans.

13          Now, before SFFA was formed, before *Fisher 2* was  
14     law, Mr. Kahlenberg actually had something to say about Dean  
15     Fitzsimmons. And what did he say? He said, "This is a  
16     leader in higher education who has," and I quote, "worked  
17     doggedly to open the doors of higher education to individuals  
18     from a broader range of racial and ethnic background."

19          This is the person they're now attacking. As  
20     President Faust said yesterday, no one in the 15 years that  
21     she's been working with Dean Fitzsimmons has ever questioned  
22     his honesty, has ever questioned his integrity, has ever  
23     questioned his truthfulness. No one until SFFA decided to  
24     make its claims.

25          Your Honor saw the witnesses. The credibility of a



1 witness is not determined by how many times I can impeach a  
2 witness with a deposition. Certainly two times doesn't make  
3 a lack of credibility. It depends upon their overall  
4 testimony and the manner in which they communicated to you.

5 Your Honor saw it. We trust Your Honor's  
6 assessment of the credibility of these folks. They were  
7 honest. They were straightforward. They admitted when  
8 things weren't good for us. They were clear when things were  
9 good for us.

10 The attack on the credibility is just an effort to  
11 cobble together and support an illogical claim.

12 Now I am going to briefly address the other claims  
13 that Mr. Hughes didn't. Let me say this on racial balancing.  
14 Slide 66 has the legal framework, and I'm not going to go  
15 into it.

16 This claim in some ways is easier to resolve for  
17 this reason. If we just look at the experts on racial  
18 balancing, Dr. Arcidiacono conceded that he had an opinion in  
19 his report on racial balancing. He conceded that he was not  
20 giving that testimony in this case, and he didn't.

21 So as a consequence, the only expert to testify on  
22 this issue of racial balancing was Professor Card, who showed  
23 you what is now Slide 67, DD 10.100, which showed that there  
24 had been significant variations year to year in the racial  
25 composition of Harvard's admitted students.

1           As Professor Card put it, if Harvard is trying to  
2 racially balance year to year, it's not doing a very good  
3 job. There are significant variations year to year. And,  
4 Your Honor, this is precisely what you would expect from the  
5 process that I've described to you and that you've heard  
6 about repeatedly.

7           When you look at the side by side -- when you look  
8 side by side at the composition of the applicant pool on the  
9 left-hand side of Slide 69 and the admitted class pool on the  
10 right-hand side, the composition of the admitted class has  
11 fluctuated more than the composition of the applicant pool.  
12 That's exactly the opposite of what you would expect.

13           Now, I think the argument that should be made here  
14 on rebuttal is about the one-pagers. I'm just going to say  
15 this: During the course of the examination of Elizabeth  
16 Yong, there was a demonstrative instruction that had a series  
17 of one-pagers, and the suggestion seems to be that's too many  
18 one-pagers. That doesn't make a racial balancing claim.

19           The one-pagers, as Your Honor now knows, if we go  
20 to Slide 70, contain more information than just race. They  
21 have information about gender and geography, intended major  
22 and race. The one-pagers are not used, if I move to  
23 Slide 72, to set quotas or floors on any group, racial or  
24 otherwise.

25           On this point, Harvard's evidence is

1 uncontroverted. Each and every one of the officers who came  
2 to court, as shown in Slides 73 and 74, testified that there  
3 are no targets, there are no floors.

4           Instead what the undisputed evidence demonstrated  
5 was that these one-pagers are distributed to three people --  
6 Dean Fitzsimmons, Director McGrath, and at the time Sally  
7 Donahue -- during the course of the process so that they can  
8 evaluate the likely yield of the class. To the extent the  
9 information is useful, it's communicated orally to the  
10 admissions officers during the full committee process.

11           But as Your Honor now knows, at the tend of the  
12 process in every admissions cycle, in every year, if I go to  
13 Slide 76, the committee goes through the lop process.

14           And they've been directed explicitly by Dean  
15 Fitzsimmons in a memo written to guide them. I doubt he ever  
16 thought it would see the light of day in a federal  
17 courthouse. What he says is at the end of the day, at the  
18 end of the day the quality of the case is what counts.

19           Now, I'm just going to very quickly address race is  
20 more than a plus factor. I don't think there's any dispute  
21 about what *Grutter* and *Bakke* says. Race can be used. It can  
22 be used as a plus factor. It can be used as a tip.

23           Now, this is interesting particularly given that  
24 the fundamental predicate of Dr. Arcidiacono's opinion is  
25 that a tip for someone is a penalty for someone else.

1 Harvard's process, Harvard's admissions process  
2 meet the standards set forth on Slide 77. In that process,  
3 race may be a factor to a particular candidate's admission.  
4 It is never the factor. Tips for race come into play only  
5 for candidates that are otherwise highly competitive.  
6 Candidates who are qualified and not just academically, but  
7 across a wide series of dimensions.

8 Once again, the testimony to Your Honor was  
9 consistent. Race can make a difference, but it's just one of  
10 many tips in the process that can make a difference.

11 And, Your Honor, if I would bring you to Slide 80,  
12 the data confirmed that. First the experts agreed that race  
13 does not make a difference in the admissions decision for a  
14 majority of applicants. A large number of applicants to  
15 Harvard would be rejected without ever having their race  
16 considered. And there is a group that are so qualified  
17 they'll be admitted without the race being considered.

18 Second, if I move to Slide 81, Your Honor, when  
19 race does come into play, it's only for applicants who are  
20 highly qualified and highly competitive. This is the chart,  
21 and it demonstrates that race matters but only to candidates  
22 who have a high probability of admission to begin with.

23 Now, Your Honor, to be sure, there are some  
24 African-American applicants for whom the tip of race can make  
25 a difference. And I want to pause here for a minute to

1 emphasize something that at least to me personally is very  
2 important.

3 Contrary to Dr. Arcidiacono's charts and  
4 implications, all the students that are admitted to Harvard  
5 are qualified. All the African-American students admitted to  
6 Harvard are eminently qualified, all the Hispanic students  
7 are eminently qualified, and so too are the Asian-Americans  
8 and whites.

9 The suggestion that African-American and Hispanic  
10 students at Harvard are somehow less qualified or were  
11 admitted only because they got a tip of race is not true.  
12 It's actually offensive. For highly competitive candidates  
13 race can make a difference, but only if you have many other  
14 factors that get you there first. Dr. Card explained that  
15 yesterday.

16 Every dimension of the candidate matters. Multiple  
17 dimensions matter.

18 The fact is that Harvard's pool is, fortunately for  
19 Harvard, highly competitive on many dimensions. In this  
20 competitive pool, the presence of any additional factor,  
21 including race for some candidates, can make a difference.

22 Lastly, race-neutral alternatives, which Mr. Hughes  
23 didn't address. So let me try to summarize our position so  
24 Your Honor has it. And we'll brief it more fully.

25 First, the process. While there was some

1 discussion of the Ryan committee, my bet is you've heard more  
2 about the Ryan committee than you might want to hear. So  
3 let's talk about the committee that did do the work.

4 I would say this on the Ryan committee: The idea  
5 that you have a committee and then you get sued and someone  
6 is making precisely the claim that the committee is going to  
7 consider, suspending the work of the committee is not a  
8 illogical thing to do.

9 But the committee was -- for the college was  
10 reconvened later, and it had three people: Dean Smith, Dean  
11 Khurana, Dean Fitzsimmons. They were the right people for  
12 the job because they were the people responsible for  
13 precisely the alternatives that might be considered.

14 Dean Smith described to you the work of the  
15 committee. They met seven times. They worked outside of the  
16 committee room. They reviewed literature. They reviewed  
17 expert reports from this case. They considered and evaluated  
18 every race-neutral alternative Mr. Kahlenberg proposed and  
19 more. They considered, for instance, elimination of the  
20 consideration of SATs.

21 And at the end, it was the judgment of these three  
22 senior leaders of Harvard, after looking at all of this  
23 material, after looking at simulations from both expert  
24 witnesses, that at this time race-neutral alternatives could  
25 substitute no -- no race-neutral alternative could substitute

1 for the consideration of race as one consideration among  
2 many.

3 They looked. They reached this conclusion by  
4 looking at what would happen in those simulations. Not just  
5 to racial diversity, Your Honor, but to all kinds of  
6 diversity on the Harvard campus and what it would do from an  
7 intellectual and excellence point of view.

8 And they found that the plaintiff's suggested  
9 alternatives resulted in decreases in the student body  
10 excellence, decreases in diversity, decreases that were  
11 simply not acceptable to Harvard.

12 Now, as Your Honor now knows, Harvard has had a lot  
13 of experience with race-neutral alternatives. It addressed  
14 the issues with the Supreme Court back as far as *Bakke*. Dean  
15 Fitzsimmons is one of the people who has been working on  
16 race-neutral alternatives for socioeconomically disadvantaged  
17 folks.

18 Here is what I referred to earlier on Slide 88 that  
19 Mr. Kahlenberg said in 2010, four years before the complaint  
20 was filed, about what Dean Fitzsimmons has done.

21 You've also heard about the Harvard financial aid  
22 initiative. You've also heard about the extensive  
23 recruitment effort, including the efforts to recruit  
24 Asian-American students. You've heard about the increase in  
25 tenured faculty on the campus, Asian-American tenured faculty

1 by 50 percent.

2 Now, Mr. Kahlenberg was the one witness who came in  
3 to address this issue. He's never worked in a college  
4 administration. He's never implemented a minority  
5 recruitment program. He never implemented a financial aid  
6 program. He never worked in a college admissions office.  
7 He's never been retained by a college or university anywhere  
8 to consult on any of these things. But he said, I've got  
9 some alternatives for you to consider.

10 But Harvard has considered financial aid in its  
11 expansion. Harvard has considered eliminating early action.  
12 Harvard has increased its effort to recruit socioeconomically  
13 disadvantaged students. Harvard has increased its efforts to  
14 recruit students of color.

15 With all this backdrop, Dean Smith's committee  
16 determined that the impact of the simulations which would  
17 have resulted in a decrease in African-Americans on campus by  
18 close to 40 percent was unacceptable.

19 Now, I want to say just another word or two about  
20 Mr. Kahlenberg. Mr. Kahlenberg was paid to consult on the  
21 complaint in this case. He was paid to work on a complaint  
22 that alleged that Harvard should be using race-neutral  
23 alternatives instead of race.

24 As Your Honor now knows, the day after the  
25 complaint was filed, before Harvard had even been served,



1 he's giving an interview and he's pronouncing judgment that  
2 Harvard should lose. This is not the work of an independent  
3 expert. It's not the work of someone who's gone through a  
4 deliberative process. It's the work of an advocate.

5 He had a result in mind when the complaint was  
6 filed. He had a result in mind the next day when he gave his  
7 interview. And by coincidence, his opinion four years later  
8 happened to be the same one he gave to Fox News.

9 Now, what do we know about his opinion? We now  
10 know that, to Mr. Kahlenberg, considerable racial and ethnic  
11 diversity means a decrease of African-American representation  
12 on the Harvard campus by at least 30 percent.

13 And, Your Honor, as you go back to this, we would  
14 ask you not to be fooled by his charts. What he did is he  
15 grouped African-Americans and Hispanics in an effort to show  
16 that the decrease was less than might worry folks. Only if  
17 you separate out the two do you see the true implications for  
18 what he is suggesting.

19 To be clear, a drop of 14 percent to 10 percent  
20 would mean 340 fewer African-American undergraduates on the  
21 Harvard campus. Now, Dean Smith told you that he could not  
22 overestimate the harm that change would have to the student  
23 experience.

24 But, Your Honor, you don't need to take Dean  
25 Smith's word for it, and I wouldn't take his word alone.

1           Because we heard from the students themselves. We  
2       heard from the students who are living diversity every day.  
3       We heard them tell us the importance of the current levels of  
4       diversity. And even with those levels of diversity that have  
5       increased in the last decade or two, there are still feelings  
6       of isolation, discomfort, and the lack of inclusion.

7           The impact that the plaintiff's alternatives, as  
8       they call them, would have on these students, if they even  
9       got to remain on campus and be part of the student body,  
10      would be, to quote one of the students, devastating.

11          Let me conclude our closing, Your Honor, as I did  
12      our opening. Then I reflected on how much had changed since  
13      I walked into this District Court for the first time 42 years  
14      ago. That change was manifest in the courtroom that day.  
15      That change was manifest when the students came to testify.  
16      That change is manifest in the crowd behind me today.

17          The demographics of those here with us today as  
18      this trial ends reflect the enormous progress we have made in  
19      becoming a more diverse and inclusive society and community.

20          The plaintiff wants to turn back that clock. The  
21      plaintiff thinks, as they told us under oath, in terms of the  
22      efficient allocation of minority students and winners and  
23      losers. Those are not my words, Your Honor. Those are the  
24      words of Dr. Arcidiacono, winners and losers.

25          But the institutions and people who have

1 contributed to the enormous progress and the positive changes  
2 that we witnessed in this courtroom and that we see on the  
3 university campuses today don't think in terms of winners and  
4 losers.

5 They are thinking, as President Faust told you  
6 yesterday, about taking steps to ensure that everybody is a  
7 winner; that our communities win; that societies win; that  
8 it's not a situation like Dr. Arcidiacono would like to have  
9 where whites and Asian-Americans are winners and  
10 African-Americans and Hispanics are, to use his term, losers.

11 Dr. Simmons put it the best, and I would just quote  
12 her. "How can we imagine a world in which we are not  
13 creating leaders and citizens who have the capacity to  
14 mediate differences? I cannot imagine it. And so it's with  
15 great conviction that I say that we must continue to offer  
16 diverse undergraduate education to our young people to save  
17 our nation."

18 The wolf of racial bias is indeed at our door. We  
19 ask the Court to turn the wolf out. As we said, much  
20 progress has been made. There remains much to be done.

21 Thank you, Your Honor.

22 THE COURT: All right. Thank you all. We will  
23 break for lunch. How long a break would you all like?

24 MR. MORTARA: However long works for Your Honor.  
25 30 minutes works.

1 THE COURT: Why don't we come back how about at  
2 like -- let's just make it 1:30. We probably only have about  
3 an hour left, right?

4 MR. MORTARA: We only have 20 minutes.

5 THE COURT: We have two more after you.

6 MR. MORTARA: Plus the 30 from amici.

7 THE COURT: About an hour. Let's come back at  
8 1:30. That will give everyone a break.

9 (Court recessed at 12:38 p.m.)

10 THE CLERK: Court is in session. Please be seated.

11 MR. MORTARA: Your Honor, I have a couple of  
12 additional slides for you here. Your Honor, you'll know when  
13 you get to those. There's only two.

14 THE COURT: You're going back to the first  
15 notebook?

16 MR. MORTARA: Yes, sure. I might use some of  
17 Harvard's, but we'll muddle through.

18 THE COURT: Do you have that microphone on,  
19 Mr. Mortara?

20 MR. MORTARA: I believe it is.

21 THE COURT: When you're ready.

22 **PLAINTIFF REBUTTAL CLOSING ARGUMENT**

23 MR. MORTARA: Thank you, Your Honor. It's been  
24 three weeks since I was here in front of you the last time,  
25 and it's been an experience, to say the least.

1 I want to just briefly begin with the class of 2023  
2 reading procedures and Mr. Lee's late assertion of Rule 407.  
3 That was waived when they relied on it. We will brief it.  
4 Rule 407 has been waived here.

5 The law is absolutely clear that application of  
6 racial stereotypes is intentional discrimination, and that is  
7 our claim. And we heard that sort of bias over the weeks,  
8 suggestions that Asians are one-dimensional or just book  
9 smart or are recent arrivals, as Mr. Hughes pointed out.

10 I want to address first the supposed  
11 inconsistencies as to racial stereotyping with respect to the  
12 ALDCs. Yes, the evidence is the ALDC Asians received  
13 somewhat lower personal ratings than white ALDCs. That is  
14 absolutely consistent with the idea that racial stereotypes  
15 are at work.

16 But we don't see discriminations in admissions  
17 outcomes. That's what discrimination means. You were denied  
18 admission. Lower personal scores, but they weren't denied  
19 admission, at least not in a statistically significant sense  
20 in the small population of Asians that are ALDCs.

21 Why is that? No one has ever said that Harvard  
22 wants zero Asian-Americans on campus. That's not their goal.  
23 They just don't want overrepresentation, too many.

24 If you're going to let in some Asian-American  
25 students, where do you pick first? You go to your donor

1 base, the children of your alumni, the children of your major  
2 donors. So it makes sense that being a legacy overcomes the  
3 personal rating hit that the Asian-Americans ALDCs take  
4 because of racial stereotyping.

5 I'm going to put up on the screen a slide that the  
6 defendants used. Here you see very high marginal effect for  
7 the lineage applicants. You see 30 percent boost, over  
8 30 percent boost when they're in the higher chances of  
9 getting in. Very high effects that swamp out the minor  
10 effect or the more minor effect, if you will, of the personal  
11 rating hilt.

12 And there's been some suggestion that you can't  
13 make a claim of discrimination as to a subgroup, as if  
14 there's something wrong with that. I think Your Honor may be  
15 familiar with or we will make you familiar with, through the  
16 briefing, the so-called sex-plus case law where subsets of  
17 women are discriminated against because they have children or  
18 because they behave in a gender nonconforming way. That's  
19 the PriceWaterhouseCoopers case. We will get to all that in  
20 briefing.

21 But it absolutely is possible to discriminate on  
22 the basis of race against a subset just like it's possible to  
23 discriminate on the basis of sex against a subgroup.

24 I want to get back to what matters, which is the  
25 personal rating. Dr. Card admitted that if you take the

1 personal rating out of his model, both his model from his  
2 opening report and his model from his rebuttal report -- we  
3 walked through these numbers in the transcript; that's the  
4 extra slide I just gave you, Your Honor -- he admitted that  
5 you find a statistically significant Asian penalty.

6 He admits that if race is involved, you've got to  
7 take it out. We've proven race is involved in the personal  
8 rating. Take it out. Statistically significant penalty.

9 But let's deal with his proposed alternative first  
10 that Mr. Waxman talked about, the virtual ratings analysis.

11 This is where he tried to remove race from the  
12 academic and extracurricular and personal ratings. But  
13 Dr. Card admitted that race isn't what causes the observed  
14 difference in academic and extracurricular ratings. He did  
15 that under oath when I was talking to him.

16 And just to be clear, you don't think race is  
17 influencing the academic or extracurricular ratings, right?

18 ANSWER: I think the most likely -- correct, my  
19 most likely explanation is unobserved characteristics.

20 This is day 14 at 87.

21 And then Professor Card admitted he didn't even  
22 finish the job on his virtual ratings analysis because  
23 Professor Arcidiacono had pointed out that race affects the  
24 overall rating and that race affects the teacher ratings as  
25 well.

1           And yet when I asked him, on the very next page,  
2           page 88, Professor Card said -- I said: You were here when  
3           Professor Arcidiacono talked about his findings that race  
4           influenced those ratings, weren't you?

5           He said he was here.

6           Your modified rating analysis did not deploy the  
7           teacher ratings, didn't change them.

8           Correct?

9           And one other thing about your virtual rating  
10          analysis, the overall rating, you didn't use that either?

11          No.

12          So you either have to have it one way or the other.  
13          You do it the way he said it in his first report, which is  
14          that race influences the personal rating. You yank it out  
15          just, like you did with the overall rating, or you do a  
16          complete virtual ratings analysis where you remove the effect  
17          of race from all the ratings. He did not do that. He didn't  
18          even try. He did half a loaf. And just like the SAT, your  
19          first answer is best. Pull the rating out if race influences  
20          it.

21          And I want to get a little bit to this idea that  
22          there's something funny about Professor Arcidiacono's  
23          analysis because the same reader is giving Asians a boost on  
24          academic and extracurricular and then punishing them through  
25          racial stereotyping on the personal score.



1           That's not true, and Professor Arcidiacono  
2 explained as much. He pointed out that unobservables track  
3 the observables. So what you see on the right with the  
4 academic and EC ratings is what Professor Card admitted to.

5           All the bumps and arrows, the observable goes in  
6 one direction, the race influence goes in the same direction.  
7 You see it on the right.

8           On the left you see the opposite effect in the  
9 overall rating and the personal rating. You see the  
10 observables go one way for Asian-Americans in the overall  
11 rating, but they go -- but the coefficient goes the other  
12 way. That's what's proving the Asian penalty.

13           And simultaneously you see it for African-Americans  
14 and Hispanics, proving the existence.

15           Tips, the tips that are admitted in the overall  
16 rating. And Harvard has still -- despite the fact Mr. Hughes  
17 was talking for a while about it, Harvard has still said  
18 nothing about the tips that are blatantly apparent in the  
19 personal rating.

20           I want to go there now and talk about Harvard's  
21 denials that race is used in the personal rating.

22           Mr. Hughes went over OCR and Mr. Looby and the  
23 comparison between that evidence and what Harvard's witnesses  
24 said in court.

25           I want to also point out what Director McGrath said

1 to me the first time she was here. I talked to her about a  
2 bunch of people that worked in the admissions office, and I  
3 said, Do you know whether this person had used race in the  
4 personal rating?

5 She said she didn't. One of the reasons she didn't  
6 is that they didn't have any written guidance. No one could  
7 be sure what anyone was doing. I rattled off 29 people or  
8 something from the spring of 2011 in our dataset, in our  
9 dataset those people, 29 of those people are gone. And  
10 Director McGrath had no idea whether they used race in the  
11 personal rating. One reason she had no idea is because no  
12 one had written anything down about how to do it.

13 We've shown you the data where African-Americans  
14 and Hispanics trounce whites and Asians in the personal  
15 rating. Harvard has yet to explain how it is that racial  
16 preferences are not being applied in the personal rating.  
17 And Mr. Hughes showed you those stunning differences in his  
18 slide and showed you the same pattern as the personal rating.  
19 That was Slide 19 or 6. I can't tell. I think 6.

20 All Harvard and Professor Card want to talk about  
21 is admitted variable bias and how it might explain the  
22 differences between whites and Asians. You've heard  
23 absolutely nothing about African-Americans and Hispanics with  
24 respect to the personal rating.

25 And that's important both because if you pull the

1 rating out, we win, but also because Harvard's failure to  
2 dispute the African-Americans and Hispanics get tips proves  
3 that Harvard isn't telling the whole truth about the use of  
4 race in the personal rating.

5 If Harvard dissembles and says race is not used at  
6 all and we can see that it is, how can we trust them when  
7 they say that stereotyping is not lowering the personal  
8 ratings of Asians?

9 And I want to just briefly go through Dr. Card's  
10 histograms. I'm showing you DD 10.69. I'm trying to show  
11 you DD 10.69. These histograms were used. And I don't know  
12 if you notice, this is the school support. This is  
13 Dr. Card's cherry-picked set of observables. Not all of  
14 them.

15 Mr. Waxman said all. It's not. I don't know if  
16 you noticed, he never put African-Americans or Hispanics on  
17 these charts, never once. Because if he did, he would see  
18 that his cherry-picked observables do not explain that  
19 African-Americans and Hispanics do significantly better than  
20 whites on the personal rating. He never once did it.

21 And Harvard only has one document, the backup  
22 document to Dr. Card's slides, Defendant's 692. This is the  
23 only document anywhere where they compared anything that  
24 might be related to the personal rating for African-Americans  
25 and Hispanics.

1           And when you take a look at it, Your Honor, you can  
2     see that in any of these quadrants there is absolutely no  
3     explanation when you look at these percentages for why  
4     African-Americans and Hispanics do better than whites. They  
5     do about the same or sometimes a little bit worse than  
6     Asians. They never do better than whites. These data do not  
7     explain the racial distribution in the personal rating. And  
8     that's because they don't use all the observables.

9           Professor Arcidiacono created a model that used  
10    more of the data. You see this here in Plaintiff's  
11    Demonstrative 40, which I used with Professor Card. Model 5  
12    has all the ratings in it, has the teacher ratings, has the  
13    school support, has the alumni interview ratings.

14           And then Professor Card went out and he added every  
15    single variable he could possibly find, and he still couldn't  
16    make this go away. He couldn't make the gap disappear. He  
17    told me it was statistically significant.

18           So when you combine on one hand evidence from OCR  
19    through the 2012 Harvard letter to OCR saying some readers  
20    use race in the personal rating with Mr. Looby telling the  
21    truth at his deposition before he spent ten days getting  
22    prepped to testify here, and then with Director McGrath's  
23    testimony that she had no idea how these 29 people who had  
24    left the admissions office who were applying the ratings that  
25    are in our dataset used race or not in the personal rating.

1           And then the sudden need for written prohibitions  
2     on using race in the personal rating after 28 years of  
3     refusing to write anything down. You combine all that with  
4     the powerful statistical evidence Professor Arcidiacono  
5     assembled, the evidence is inescapable that race is used in  
6     the personal rating.

7           And if race is used in the personal rating, the  
8     statistical battle, Your Honor, is over. There is a  
9     statistically significant Asian penalty.

10          This is a model Professor Card did. It has all the  
11     ALDCs. It has parental occupation, intended career. It has  
12     every single variable Professor Card wanted to throw in here.  
13     It has every interaction he wanted to do, excludes every  
14     interaction he didn't want to do. It's a model in every  
15     respect the way that Professor Card wants it except one:  
16     pull the personal rating out because the evidence is  
17     overwhelming that race is influencing it.

18          Harvard didn't even answer us on how the racial  
19     tips be are being applied in the personal rating. Didn't  
20     even respond.

21          I want to touch briefly on Harvard's anecdotal  
22     evidence. The war of summary sheets and applications is not  
23     helpful to the Court because it doesn't represent an  
24     even-handed sampling or cross-section of what looking at all  
25     the applications would give us.

1           Your Honor will recall that each side got to pick  
2       applications that were produced. And of course you know we  
3       picked based on just the database and the numbers you can see  
4       in the database.

5           Harvard got to look at the applications before they  
6       picked them. Got to fully vet and pick out everything it  
7       wanted to put in front of you. And then Harvard also got to  
8       work with its admissions personnel in the same respect that  
9       they worked with Mr. Looby so they worked with them to  
10      remember every single detail of these applications that were  
11      just a couple of the thousands these admissions officers had  
12      reviewed over the past six years.

13          Anecdotes are not persuasive evidence when Harvard  
14      has had the opportunity to cherry-pick and set up testimony  
15      on rails about what they got to select for you to see. And  
16      even to the extent that anecdotes are relevant, you know, I  
17      want to remind you of the professional figure skater in  
18      Plaintiff's 116. This is an Asian student that was so  
19      cursorily and shabbily treated by Harvard's admissions  
20      officers, she was awarded a standard strong and a personal  
21      rating of 3, almost as if her application wasn't even read.

22          I'm going to wrap up pretty soon, Your Honor. And  
23      I want to take this opportunity to thank the Court, Joan,  
24      Kelly, Karen, the law clerks, Mr. Dereau and the IT staff,  
25      and I want to even thank the CSOs and the people down in the

1 cafeteria. We have never been treated better in any  
2 courthouse in America trying a case than we have here. I  
3 don't know that I'll ever be treated better again. The  
4 experience has been absolutely tremendous.

5 My partners and co-counsel have given me the  
6 privilege of talking last, for which I also thank them.

7 And I want to talk a little bit about why I am  
8 here. I've alluded to it a few times in my more  
9 conversational moments. Count I in this case speaks to me  
10 because of my personal experience. I'm here because of my  
11 three best friends in college: Mike Gomez, Kalpesh Patel,  
12 and Saleem Zafar.

13 They have all have kids my daughter's age. I'm  
14 here because of my daughter Juliet's godmothers, Sharon and  
15 Diya. They have children my daughter's age, Asian children.  
16 Asian children who deserve the same chance to go to Harvard  
17 that my white daughter has.

18 I'm here because of an incredible young  
19 Chinese-American, my friend Rebecca Kuang who was in our  
20 dataset but did not get to attend Harvard. To meet her is to  
21 know that her personal qualities deserved a 1. And that's  
22 before you learn that she wrote her first novel at 19,  
23 recently published.

24 I am here because I spent a significant chunk of my  
25 formative years in China and studying Mandarin back in the

1 early 1990s when few suburban boys from Milwaukee did such  
2 things.

3 And I'm here on behalf of 20,000 members of  
4 Students For Fair Admissions and our standing members who  
5 brought this suit.

6 And even with all that, in another part of my life  
7 I have personal experience reviewing paper applications and  
8 assessing people based on a written record. People every bit  
9 as astounding as those who are on the bubble in applying to  
10 Harvard. I look at grades, test scores, recommendations, and  
11 I know how hard it is to judge someone's personality from the  
12 written record. You have to be vigilant about implicit bias  
13 and stereotyping well beyond e-mailing an article around once  
14 every few years.

15 Harvard has not been vigilant and Asian-American  
16 applicants paid the price.

17 Your Honor, I don't envy the job in front of you.  
18 I have no idea how I'd respond to the historic task you have.  
19 But what I do know is that in our judicial system this Court  
20 may have the first and last word as a factual matter on what  
21 happened here at Harvard, and that's because no one knows  
22 what changes in the law are ahead of us as the case moves on.

23 Your Honor may remember I mentioned in my first  
24 cross-examination of Director McGrath the perception that  
25 racially charged language, stereotypes, or even



1 discrimination may be perceived in our country as less  
2 important or less harmful when they're directed at  
3 Asian-Americans than when directed at other minorities. At  
4 some level, this is because of the model minority stereotype  
5 and the overrepresentation canard we saw deployed during  
6 Professor Arcidiacono's examination.

7 The question is whether Asian-Americans will be  
8 told some time next year that, yes, this did happen here,  
9 that racial stereotyping and bias led to a penalty at  
10 Harvard, or whether they get the news that even though  
11 Harvard's own researchers found an Asian penalty before there  
12 ever was a lawsuit, Harvard can pay for enough variables to  
13 make it all go away as long as you pretend the personal  
14 rating has nothing to do with race that is.

15 Some day this will be written about in the history  
16 books, and those books will say there was Asian  
17 discrimination at Harvard. Of that, I'm confident. Those  
18 books might say that Harvard let the wolf of racial bias in  
19 through the front door, as I put it a few weeks ago and  
20 Mr. Lee paraphrased. They might point out that this summer  
21 Harvard took a small step to start to close that door.

22 We hope those books will say this Court slammed the  
23 door shut. Thank you, Your Honor.

24 THE COURT: Thank you, Mr. Mortara.

25 The Amici closings.

**AMICI STUDENT CLOSING ARGUMENT**

MS. TORRES: Hi. Genevieve Bonadies Torres, and I represent the --

THE COURT: Voice way up. I can barely hear you and you're facing me.

MS. TORRES: I represent the student Amici in this case. This case may involve Harvard's admissions policy, but the impacts are felt most directly by students. The outcome impacts what students can express and have considered by Harvard and elite colleges across the country. It impacts whether students' experiences will be valid, and it impacts the educational environment students will encounter.

Students are at the heart of the issues in this case, and their testimony is telling both for what the students say and for where they are silent.

The Court did not hear from any of SFFA's students nor review any of their files. The only testimony came from student amici and student organization amici on Monday. And this student testimony and their application files speak to both sets of claims before this Court.

As this Court knows, the first set of claims challenges Harvard's appreciation of race and ethnicity to promote diversity. Here, the students' testimony and application files provide proof that Harvard's use of race is both constitutionally acceptable and wise.

1           With regard to plaintiff's claim of intentional  
2 discrimination, the students' application files illustrate  
3 that Harvard's admissions officers view Asian-American  
4 ethnicity in a positive light, not a negative one.

5           I'm going to focus nearly entirely on plaintiff's  
6 challenge to race-conscious admissions.

7           Three weeks ago the plaintiff's counsel stood  
8 before you and stated diversity and its benefits are not on  
9 trial here. But make no mistake, diversity is what is at  
10 stake in this case. That's because SFFA is seeking a remedy  
11 where race would be erased in the application process.

12           This type of erasure threatens to ignore diverse  
13 experiences that applicants offer, and it also threatens to  
14 suppress diversity on campus. The students spoke to these  
15 troubling consequences, and their application files show why  
16 such an outcome is not constitutionally required.

17           Specifically they affirmed that Harvard more than  
18 satisfies two aspects of the narrow tailoring standard.

19           First, individualized review. Our four students'  
20 files arguably are the best illustration of what Harvard's  
21 admissions officers have said again and again. One, our  
22 students and all admitted students to Harvard are  
23 exceptional; two, to the extent race is considered, it is one  
24 of many factors, and it is only viewed as a positive,  
25 including for Asian-American students; three, it is flexibly

1 applied and not formulaic.

2 All four of our student amici -- Itzel Libertad  
3 Vasquez-Rodriguez, Sarah Cole, Thang Diep, and Sally Chen --  
4 discuss why their racial and ethnic background throughout the  
5 application process was important to them. Why? Because  
6 it's inextricably intertwined with their experiences and  
7 can't be extricated. It's critical to appreciate their  
8 achievements and contributions.

9 Take Thang. He has a strong GPA and commitment to  
10 social justice. But in his words "I don't think they can be  
11 necessarily understood without taking into account the fact  
12 that I moved here when I was eight, I didn't speak English,  
13 and I excelled despite the racial prejudice I encountered."

14 All four of the application files show that race  
15 was only considered alongside a multitude of other factors  
16 and never provided any preset advantage or disadvantage.

17 Take Itzel's application. The extensive comments  
18 in her file make it clear that her admission was based upon  
19 having multiple strengths. Her file was marked up with notes  
20 about how she has a strong set of AP scores, how she was  
21 demonstrably a hard worker with a nearly perfect GPA, how she  
22 was editor of her newspaper, how she had athletic success as  
23 a runner, and how her guidance counselor highlighted her  
24 "electric personality."

25 While there is reference to her ethnicity, she is,

1 quote, connected with her heritage after a period of  
2 disconnect. This appears alongside the variety of other  
3 strengths Itzel offers.

4 Importantly, our students' files show that this  
5 limited, positive consideration of race is equally applied to  
6 students of Asian-American heritage. Like Itzel, Sally and  
7 Thang also received positive comments by Harvard's reviewers  
8 associated with their racial and ethnic backgrounds.

9 For Thang, the same reviewer who noted his  
10 Vietnamese identity and use of pencils to improve his English  
11 also positively noted his commitment to pushing himself  
12 academically and socially.

13 For Sally, the interviewer noted how her upbringing  
14 in a culturally Chinese home where she served as a translator  
15 reflected positively on her responsibility to take care of  
16 others.

17 The students' files and testimony also show that  
18 having a relatively lower academic score does not make an  
19 applicant academically unqualified or undeserving in  
20 admission.

21 Three of our four students received an academic  
22 rating of a 3 or a 3+ despite stellar accomplishments. Sarah  
23 received straight As and A-pluses at a premiere prep school.  
24 Itzel took 10 AP tests and scored the top score on 7. And  
25 Thang was valedictorian at an intensive magnet program.

1 Proof that they were academically qualified, they thrived at  
2 Harvard and beyond, becoming, in Harvard's words, citizen  
3 leaders.

4 Sarah graduated with a 3.6 GPA and has committed  
5 herself to serving our public school system. Itzel graduated  
6 cum laude with a 3.7 and now serves as a California assembly  
7 fellow. Indeed, our students are a reminder that merit  
8 cannot be measured by academic ratings. Their contribution  
9 to Harvard's campus were extensive, and some of those  
10 contributions did flow from their perspectives as ethnoracial  
11 minorities.

12 For example, Sarah led the Black Students  
13 Association during a time when Harvard, like our country, was  
14 grieving the slew of police shootings of black people. In  
15 this role, she worked with Harvard's administrators and white  
16 student groups, Latino student groups, and others to help  
17 them, quote, think through just what was black lives matter  
18 and how they could be better allies.

19 She responded to calls from Dean Khurana to draft  
20 emails for the entire student body to guide them and console  
21 them in the aftermath of yet another shooting. Her actions  
22 took time and represent tangible contributions. Indeed, she  
23 recounted how countless classmates and professors thanked her  
24 for sharing her perspective shaped by her race.

25 There is nothing wrong with an admissions system

1 valuing this along with the myriad of other contributions  
2 Sarah offered.

3 Our students' files put on full display that  
4 Harvard is genuinely engaged in an individualized review that  
5 values all ethnoracial backgrounds, whether Chinese or  
6 Chicana, and that it does so in a limited, flexible way to  
7 develop a class that is diverse across a range of dimensions.

8 Moving on to the second aspect of narrow tailoring  
9 that students affirm, there is no workable race-neutral  
10 alternative available because such alternatives reduce the  
11 depth of diversity on Harvard's campus. This is clear from  
12 what's undisputed at trial.

13 Harvard's counsel talked about this briefly, but  
14 I'll just restate because it's important to the students that  
15 there is no dispute that if you ended the consideration of  
16 race, the number of black, Latinx, and other minority  
17 students would plummet by about 50 percent in terms of sheer  
18 numbers.

19 Plaintiffs have tried to soften the blow with their  
20 proposed race-neutral alternatives, but even their preferred  
21 alternative would cause the number of admitted  
22 African-American students to drop by about 30 percent in  
23 terms of numbers.

24 More than this, the students have offered  
25 undisputed testimony that these projections likely

1 underestimate the actual decline. The students testified  
2 that if Harvard stopped considering race, it's likely that,  
3 one, fewer students of color would apply.

4           You heard Itzel forthrightly state, "Honestly I  
5 probably would not have applied to Harvard if they didn't  
6 take race into account." And Sarah Cole affirmed that this  
7 type of likelihood by saying that it would signal to students  
8 that they weren't welcome and reduce applications from  
9 students of color.

10           Two, testimony also suggested that fewer students  
11 of color would accept. Sarah testified that her choice to  
12 accept Harvard's offer was substantially influenced by  
13 encountering a strong presence of other black students on  
14 Harvard's campus. If that presence declined, there's a  
15 substantial risk that the acceptance rate would decline, too.

16           The plaintiff's expert on race-neutral  
17 alternatives, Richard Kahlenberg, tried to downplay this  
18 decline in two ways: First, he emphasized how his  
19 alternative would yield greater socioeconomic diversity. But  
20 all four student amici testified that the educational  
21 benefits that flow from socioeconomic diversity cannot be  
22 equated with those flowing from racial diversity.

23           As Itzel expressed, ethnoracial diversity is  
24 something that's more visibly salient. "When I walked  
25 through campus, I didn't feel judged or discriminated against



1 because of my socioeconomic status. I felt discriminated  
2 against because of my ethnoracial identity."

3 Itzel shared that it was only in spaces with Latinx  
4 and Native American students that she felt that she could,  
5 quote finally breathe. Socioeconomic diversity does not on  
6 its own provide that space.

7 Second, Kahlenberg downplayed this decline by  
8 emphasizing how the overall numbers of black, Latinx, and  
9 other minority students stayed relatively steady, but this  
10 ignores other dimensions of diversity.

11 Overall representation is important, but so is the  
12 representation of each particular racial group. A decline in  
13 any one group can be problematic, and this is particularly  
14 true when that group is already marginalized and relatively  
15 low in numbers.

16 Take Sarah Cole's experience. When Harvard's  
17 newspaper published an article saying that, quote, admitting  
18 black students to Harvard is like teaching a blind person to  
19 be a pilot. At that moment and the many others when Sarah  
20 encountered racial prejudice specifically targeted at the  
21 black community, it was the strong presence of other black  
22 students on Harvard's campus that mattered to Sarah. There  
23 needed to be enough in terms of numbers for her to, quote,  
24 lean on and form a true community.

25 And it was this support system that allowed Sarah

1 and other black students to, quote, remain steadfast in our  
2 confidence and thrive, despite bigoted comments that they and  
3 an entire race of people did not deserve to be at Harvard.

4           Interracial diversity represents another concern.  
5 As the amici organization member Madison Trice reflected, she  
6 and other students have benefited from having, quote, every  
7 nearby of black identity celebrated, and so it has a space on  
8 campus. It's this diversity within the black students that  
9 makes it, quote, harder to have stereotypes because you can  
10 learn about the different shapes that blackness can take.

11           A 30 percent reduction in the number of black  
12 students would likely reduce such interracial diversity, as  
13 would Kahlenberg's mechanical race-neutral preferences across  
14 all racial groups.

15           And the harms would flow to all students, including  
16 white and nonwhite students. Such a reduction would, even if  
17 limited to the black community, be, in the words of Itzel,  
18 fairly catastrophic.

19           As a Vietnamese student, Thang similarly shared a  
20 30 percent decline in the black student population would,  
21 quote, hurt his education dramatically, as the efforts led by  
22 black students have allowed him to better, quote, understand  
23 issues affecting a different community and better understand  
24 his own.

25           Turning very briefly to plaintiff's claim that

1 Harvard intentionally discriminates against Asian-Americans,  
2 the student amici observed that Sally and Thang's admissions  
3 files strongly indicate Harvard is only considering race in a  
4 positive light.

5 Both Sally and Thang openly and extensively  
6 discussed their ties to their Asian heritage. Both files  
7 contain comments indicating their ethnic identities were seen  
8 as a strength, and both received personal scores of 2 or a  
9 2-, relatively high scores.

10 Sally and Thang's files show that Harvard's policy  
11 of appreciating race in admissions is not discriminating  
12 against Asian-Americans. In fact, it oftentimes helps such  
13 applicants and can cultivate diversity within the admitted  
14 group of Asian-American students by appreciating distinctions  
15 in their immigration and cultural histories.

16 Sally's testimony serves as a reminder that a  
17 policy that appreciates race is one of many factors is just  
18 as important for applicants from culturally Chinese homes.  
19 As Sally stated, quote, I decided to write about being  
20 Chinese-American and being from a working-class immigrant  
21 family precisely because I felt like stories like mine were  
22 fading under this model minority myth.

23 She continued, "I think that there was no way in  
24 which flat numbers and a resume could have gotten across how  
25 much of a whole person that I am. And I that that it's truly

1       incredible to have been seen and have been heard for who I am  
2       and valued for it."

3               On behalf of all of our students, I thank this  
4       Court for letting them share their stories about how this  
5       policy has positively impacted them and better prepared them  
6       to positively impact others. Thank you.

7               THE COURT: Thank you, Ms. Torres.

8               MS. McCLELLAN: May I proceed, Your Honor?

9               THE COURT: Yes. Get that microphone right up to  
10      your mouth.

11               **ORGANIZATION AMICI CLOSING ARGUMENT**

12              MS. McCLELLAN: Good afternoon, Your Honor,  
13      counsel. My name is Cara McClellan, and I represent 25  
14      Harvard student and alumni organizations as amici curiae in  
15      support of Harvard's ability to consider race as one of many  
16      factors in its holistic admissions process.

17              In the words of Dean Fitzsimmons, race is one part  
18      of a person's life that may lead that person to be a great  
19      educator of others, about how to be a good citizen and  
20      citizen leader, not just at Harvard, but later.

21              During this divisive time for our country, the need  
22      for citizen leaders, educated in diverse settings, remains as  
23      urgent as ever. My clients include thousands of Harvard  
24      students and alumni who are black, white, Latinx, Native  
25      American, and Asian-American. Some grew up in public housing

1 and were the first in their families to attend college.  
2 Others come from families that have achieved financial  
3 success and impressive educational credentials yet still  
4 experience the effects of persistent racial discrimination in  
5 our country.

6           You have heard from: Professor Margaret Chin, a  
7 Chinese-American alumna, a founding board member of the  
8 Coalition For a Diverse Harvard, and a member of the Harvard  
9 Asian-American Alliance.

10           Catherine Ho, a Vietnamese-American sophomore and  
11 copresident of the Harvard-Radcliffe Asian-American woman's  
12 association.

13           Madison Trice, a black sophomore, political action  
14 chair of the Association of Black Harvard Women, and a member  
15 of the Harvard-Radcliffe Black Students Association.

16           And Cecilia Nunez, a black and Mexican-American  
17 junior, vice president of Fuerza Latina, and a board member  
18 of the Phillips Brooks House Association.

19           You have also heard from four additional Harvard  
20 students and alumni: Itzel Libertad Vasquez-Rodriguez, Sarah  
21 Cole, Thang Diep, and Sally Chen.

22           In contrast, no students have come forward to  
23 testify in support of ending race-conscious admissions.

24           SFFA has not met its burden of proving that Harvard  
25 can fulfill its educational admission which requires that it

1 put together an exceptional, racially diverse class without  
2 considering race.

3 Instead the stories that you heard this past Monday  
4 from Harvard students and alumni first demonstrate that race  
5 is an indelible part of their lives, their educational  
6 experiences, and their long-term professional goals.

7 Second, each witness described how black, Latinx,  
8 and Asian-American students and alumni and the organizations  
9 they form are indispensable to Harvard's ability to reap the  
10 educational benefits of diversity.

11 And third, their testimony also made clear that the  
12 dramatic reduction of black and Latinx students on campus  
13 from the loss of race conscious admission estimated at  
14 50 percent would be devastating for all Harvard students.

15 As one of my clients, Catherine Ho, put it,  
16 diversity allows for more opportunities to organically learn  
17 from other people, listening to their stories and listening  
18 to their perspectives.

19 But if their perspectives and stories aren't  
20 present on campus, who are we supposed to be learning from?

21 First, the evidence unequivocally shows that  
22 race-conscious admissions must be preserved to completely and  
23 holistically evaluate individual student applicants.

24 For many students of color, early experiences  
25 related to race are a formative part of their identity, and

1 they include this in their application.

2 For some, memories of discrimination or observed  
3 inequality are at the root of what motivates them to work  
4 hard and to advocate for change. This is evident in the  
5 amici witnesses testimony about their educational experiences  
6 in college application essays.

7 Catherine Ho testified that her ethnoracial  
8 identity is a core part of who she is and became the focus of  
9 all three personal essays she submitted to Harvard. In one  
10 essay, the Vietnamese language, a language that has no past  
11 tense, provided a metaphor for how she understands her  
12 parents don't-look-back attitude. As refugees from Vietnam,  
13 her parents overcame many barriers. Their strength is what  
14 drives her to push forward despite obstacles.

15 When Catherine viewed her application file and  
16 learned that her Vietnamese heritage was an aspect of her  
17 identity that Harvard valued, she rushed to tell her father.  
18 Although her father's refugee story is not always  
19 appreciated, she believes she carries important lessons  
20 because of this history, a contribution the Harvard  
21 admissions committee recognized she would bring before she  
22 even arrived.

23 In addition to impacting the development of  
24 applicants' individual identity, race systematically impacts  
25 the opportunities and resources that applicants can access

1 before they apply to college. Too often the resources  
2 available in a school correlate with the racial makeup of the  
3 school.

4 Sarah Cole described how her predominantly white  
5 college prep school included standardized test prep in its  
6 curriculum, while her friends at the majority black local  
7 public high school were offered no such opportunities.

8 As Tia Marie Ray, director of the undergraduate  
9 minority recruitment program, explained, Harvard recognizes  
10 that resources impact students' performance on SATs. Even in  
11 wealthy, high-performing schools, students of color face bias  
12 that can limit academic opportunities.

13 Madison Trice testified about facing the bigotry of  
14 low expectations. Her elementary school teacher discouraged  
15 her from entering her school's gifted program, despite her  
16 excellent grades, until her parents intervened to challenge  
17 an arbitrary entrance examination and requirement that only  
18 seemed to apply to her, the so-called 10 perfect score rule.

19 Once enrolled in more advanced courses, Madison  
20 spent most of her academic life as one of the only black  
21 students in her class, facing bullying and social isolation  
22 because she was different.

23 As Dean Fitzsimmons' testimony made clear,  
24 Madison's experience is not uncommon. Many students of color  
25 who apply to Harvard come from academic environments where



1 they feel isolated as minorities and write about this  
2 experience to help the admissions office contextualize the,  
3 quote, persistence, courage, and self-confidence that went  
4 into their remarkable achievements.

5 Indeed, Madison wrote in her personal essay that  
6 the different treatment she endured led to her aspirations to  
7 pursue a career in foreign service and work on behalf of  
8 marginal communities experiencing oppression abroad.

9 Preventing her from speaking about her race would  
10 inhibit her ability to fully describe what motivates her  
11 intellectual and professional ambitions.

12 SFFA would prohibit universities from considering  
13 race as part of a holistic review while allowing colleges to  
14 consider other aspects of an applicant's identity such as  
15 socioeconomic status, gender, sexual orientation, or their  
16 disability. However, pretending to be race blind when  
17 reviewing applications will only disadvantage applicants of  
18 color, including Asian-American students whose full stories  
19 would be ignored.

20 Second, amici witnesses' testimony provides real  
21 life validation for why the Supreme Court has repeatedly  
22 affirmed that the pursuit of the educational benefits of  
23 diversity is a compelling interest that colleges and  
24 universities may seek. As the Supreme Court recognized in  
25 *Fisher*, a diverse student body promotes cross-racial

1 understanding and the lessening of racial isolation and  
2 stereotypes.

3 At Harvard, student affinity groups help facilitate  
4 these benefits by advocating for inclusivity and creating  
5 opportunities for students of all backgrounds to engage in  
6 cross-cultural exchange. Affinity of groups provide critical  
7 support that allow students of color to feel comfortable  
8 being their authentic selves. This happens when a student  
9 who was once bullied for being different opens the  
10 Association of Black Harvard Women survival guide and reads  
11 that black hair is beautiful and versatile.

12 Cultural organizations also challenge the broader  
13 Harvard community to become more culturally literate and  
14 respectful of difference. Like when La Fuerza successfully  
15 advocated for more culturally competent mental health  
16 providers on campus or when the Asian-American Women's  
17 Association hosted a workshop to address anti-black bias.

18 Diversity within the vibrant affinity groups on  
19 campus matters. It relieves students of color from feeling  
20 like representatives of their entire race and allows  
21 flexibility to explore different aspects of their identity  
22 and culture. It combats stereotypes as students see multiple  
23 representation of what it means to be a particular race.

24 Importantly, diversity within groups requires a  
25 holistic approach that considers the multifaceted identities

1 of applicants beyond just checking a box. By serving Harvard  
2 for decades in this way, affinity groups and the individual  
3 students who form them improve the community's critical  
4 thinking skills, communication skills, and civic engagement,  
5 among other things.

6           Unfortunately, without race-conscious admissions, a  
7 substantial reduction in black and Latinx students would  
8 threaten the continued existence of cultural organizations  
9 and the benefits they provide. Some organizations would have  
10 to reduce the size of their leadership boards or the  
11 programming they offer.

12           Other organizations and their subgroups would  
13 suffer such a stark reduction in their membership that they  
14 would cease to exist or no longer have the capacity to be  
15 effective.

16           Because collaboration across organizations is  
17 essential, even organizations whose membership ranks are not  
18 significantly reduced would no longer be able to provide the  
19 same experiences for their members and for the larger Harvard  
20 community.

21           As Cecilia Nunez testified, the idea that there  
22 would be a much smaller pool of Latinx students on campus is  
23 concerning as it calls into question whether Fuerza Latina as  
24 an organization can exist. In addition, she continued, it  
25 would impact the well-being of our constituents. That could

1 mean even more students feeling that much more alone on  
2 campus.

3 As student amici pointed out, the witnesses we  
4 heard from explained that racial diversity was a crucial  
5 factor in why they applied to and ultimately decided to  
6 attend Harvard.

7 For Professor Margaret Chin, Harvard was not even  
8 on her radar until she attended a college fair in Chinatown  
9 and heard from Asian-American Harvard students that she  
10 should apply.

11 Roger Banks, who served as director of the  
12 undergraduate minority recruitment program for 20 years,  
13 explained that, quote, typically the leaders of various  
14 minority groups and communities on campus became recruitment  
15 coordinators and host students during Visitas, a prospective  
16 student weekend. This allows students to, quote, really see  
17 what its like as a student of color at Harvard.

18 Cecilia Nunez considered it very important to be in  
19 a school that had a diverse student body. Visiting Harvard  
20 during Visitas weekend affirmed that Harvard would be a good  
21 fit.

22 While the undergraduate minority recruitment  
23 program is a key tool, what ultimately attracts many students  
24 of color to Harvard is the diversity itself. Without this  
25 diversity, admissions officers and student ambassadors could

1 not be as persuasive and successful in their recruitment  
2 efforts.

3 As Cecilia explained, "If Harvard hadn't felt like  
4 it was a space that would be welcoming to people of color and  
5 if it hadn't felt like a very diverse space, it probably  
6 would have affected my decision to go."

7 The diversity attained through race-conscious  
8 admissions must be preserved in order to attract future  
9 classes of diverse students.

10 Finally, our witnesses' testimony makes clear that  
11 Dr. Kahlenberg is wrong. Race-neutral alternatives cannot  
12 provide meaningful full diversity, and the educational  
13 benefits currently conveyed would be lost under an admissions  
14 program that does not actually consider race.

15 In all of Kahlenberg's simulations of race-neutral  
16 alternatives, the racial group that bore the greatest burden  
17 was black students. The percentage of black students  
18 declined dramatically in each simulation. And in some, the  
19 result was a 40 percent reduction of the number of black  
20 students on campus.

21 Dr. Kahlenberg did not talk to a single Harvard  
22 student or faculty member about how a reduction of black  
23 students would affect the quality of a Harvard education.

24 But Your Honor has had the benefit of hearing from  
25 eight amici witnesses, each of whom testified that a loss of

1 black students of this magnitude would fundamentally alter  
2 the educational experience for all students.

3 In addition, each amici witness testified that  
4 while socioeconomic status is important, it is not a  
5 substitute for understanding and addressing race.

6 Race remains a visible marker that cannot be  
7 ignored. Cecilia Nunez described how she faced bias growing  
8 up that was based on race and entirely unrelated to her  
9 socioeconomic status. She grew up in an upper middle class  
10 family, her parents are both doctors, yet people often  
11 assumed that her family wasn't educated or -- and I'm  
12 quoting -- that they were in some way less than other  
13 families in their city.

14 In elementary and middle school, classmates were  
15 not allowed to come over to play at her house because their  
16 parents made false assumptions that her family would be a bad  
17 influence. Assumptions like these are wrong regardless of a  
18 family's socioeconomic status, but Cecelia's experience show  
19 how these assumptions persist for families of color, even  
20 when they've achieved financial comfort.

21 Importantly, Dr. Kahlenberg parts ways with SFFA.  
22 It acknowledges that racial discrimination faced by  
23 applicants of color should be considered as part of the  
24 admissions process, and he further concedes that employing  
25 race is, by definition, the most efficient method of

1 promoting racial diversity. On this point, we agree.

2 Behind the dueling statistical models in this case  
3 are real people directly impacted by Harvard's race-conscious  
4 admissions policy. Students and alumni for whom diversity  
5 and inclusion that it fosters remain a pressing concern that  
6 cannot be taken for granted.

7 We heard painful stories that show the harsh ways  
8 race continues to impact the experiences of Harvard students.  
9 A Chinese-American student assumed to be a tourist and asked  
10 to leave the common room. A black student labeled  
11 threatening and treated violently by Cambridge police. A  
12 group of Latinx students called wetbacks while walking around  
13 campus with friends.

14 The stereotypes and prejudice experienced by these  
15 students varied, but the hostile and alienating message was  
16 always clear. Students and alumni who have been committed to  
17 diversity and inclusion for decades, like Professor Chin,  
18 advocate for race conscious solutions.

19 Plaintiffs mention Dr. Chin's article from 35 years  
20 ago but failed to mention its conclusion that race-conscious  
21 solutions are necessary to address any bias against  
22 Asian-American applicants.

23 Your Honor has also heard stories of the  
24 transformation that happens when some of our country's  
25 brightest young people have the opportunity to engage with

1 classmates who are different from them, sometimes for the  
2 first time in their lives.

3 The benefits of diversity can be found in the  
4 late-night conversations between two roommates. One black  
5 whose family is from Ghana, one Asian-American whose family  
6 is from Vietnam, assigned to live together in a dorm room  
7 where they fall asleep talking to each other at night.

8 For Catherine Ho, the experience of living with her  
9 roommate opened her eyes to how police brutality impacts  
10 black students, making her personally connected to a social  
11 problem from which she previously had the privilege of being  
12 relatively removed.

13 Harvard has embraced its educational mission of  
14 preparing the future citizen leaders of our country to  
15 address the enduring schisms and problems that plague our  
16 society. How, Dr. Ruth Simmons asked, can we expect our  
17 future leaders to remediate these schisms if we don't prepare  
18 them to do so?

19 Similarly, as a leader in the Phillips Brooks House  
20 Association, Cecilia Nunez explained that, quote, it's very  
21 important that we have people who understand our  
22 constituents' diverse experience. Her comments referred to  
23 her volunteer activities, but the same principles apply to  
24 the future work of citizen leaders after college.

25 Harvard's diversity puts students in an environment



1 where people of different backgrounds stop being faceless  
2 others and become classmates, teammates, lab partners, and  
3 friends. In this process, stereotypes are undermined,  
4 cross-cultural relationships grow, and deeper understandings  
5 of complex social problems are formed.

6 The testimony you have heard makes clear, racial  
7 diversity is one of the most meaningful aspects of the  
8 preparation that Harvard students receive. Harvard must be  
9 permitted to pursue the benefits of diversity if it is to  
10 fulfill its educational mission. Thank you.

11 THE COURT: All right. Thank you all.

12 I think what remains is a schedule for findings of  
13 fact and conclusions of law. Do you want to submit that in  
14 the next few days? Does that make the most sense?

15 MS. ELLSWORTH: Yes, Your Honor. We can confer  
16 with SFFA and submit something in writing if that works for  
17 you.

18 THE COURT: Welcome back, Mr. Consovoy. Your voice  
19 has been missing.

20 So we have finished. I know I said this at the  
21 midpoint, but I really want to thank you all. To echo  
22 something that Mr. Mortara said, I really feel privileged to  
23 have participated in a trial where the lawyering by  
24 everybody, the lawyer for both parties and the amici, has  
25 been so exceptional.

1 I don't know if I will have another case in my  
2 career where I can say that the presentation has been as  
3 exceptional and professional and thoughtful as it has been in  
4 this case. So I want to thank you for all of that.

5 Obviously the issues raised by this case are  
6 incredibly important both for the parties to the case but  
7 also sort of for the world, or at least for students in the  
8 United States. And I take the charge seriously and will wait  
9 for your findings of fact and conclusions of law.

10 And we'll have another closing session. I suspect  
11 that most of you know in this courtroom how difficult it is  
12 to try the hours we've been trying and keep the rest of the  
13 docket afloat. So my thanks also to Joan and Karen and the  
14 law clerks who have all been exceptional throughout this.

15 But again, I really can't compliment you enough for  
16 the job that's been done throughout this trial. It's really  
17 been a privilege. And I hope that our final work product on  
18 it is worthy of the effort that you all have put into it. So  
19 thank you very much.

20 We will reconvene, but in the meantime the case is  
21 recessed.

22 (The Court adjourned at 2:25 p.m.)  
23  
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